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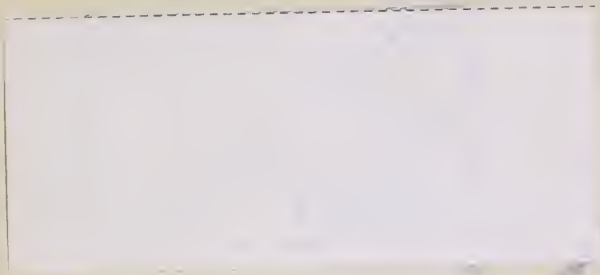

REPORTS OF CASES

DECIDED IN THE

NATIVE APPEAL COURTS

OF THE

TRANSKEIAN TERRITORIES

1910-11.

SELECTED AND REPORTED BY

BENJAMIN HENKEL,

CLERK OF THE NATIVE APPEAL COURT.

CAPE TIMES LIMITED.

1912.

These Reports should be cited as
N.A.C. (1910-11).

NOTE.

THE place, date, and name appearing above each case refer to the place of session of the Native Appeal Court, the date of hearing of the appeal, and the name of the President of the Court, while the Court of Origin is placed immediately below the names of the parties.

B.H.

Umtata, July, 1912.

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NATIVE APPEAL COURT REPORTS.

Butterworth. 1 March, 1910. A. H. Stanford, C.M.

Culwa vs. Culwa.

(Nqamakwe).

Ileqe Beast—Marriage Customs.

The judgment of the Appeal Court in this case contained the following statement of custom regarding "Ileqe":—

Pres.:—Under Native custom as practised in olden times the "Ileqe beast" was an animal which was usually sent with the bride or very shortly after the marriage to be slaughtered at the husband's kraal to provide the bride or wife with a kaross or skirt. The husband might if he thought fit, or the animal was unsuitable for the purpose, exchange it for one of his own, the latter being slaughtered in the place of the "Ileqe beast," which then became the property of the husband. In the event of a dissolution of the marriage or dowry being returned the husband had to refund the Ileqe beast. In the event of the animal not having been slaughtered (a most unusual occurrence) but being kept for breeding purposes it and its progeny became the property of the husband, and on his death ownership would rest in his heir.

Butterworth. 1 March, 1910. A. H. Stanford, C.M

Sobaliso vs. Fanca.

(Tsomo.)

Adultery—Pregnancy—Measure of damages—Fingo Custom.

Fanca sued Sobaliso for 6 head of cattle or £50 as damages for adultery and ensuing pregnancy.

Defendant admitted the wrong and pleaded tender of 3 head of cattle made before issue of summons. Plaintiff refused this tender as insufficient.

The Resident Magistrate in awarding five head or £25 stated in his reasons that he followed the practice adopted in Tembuland.

Defendant appealed.

Pres.:—For many years past the number of cattle awarded for adultery causing pregnancy in the Fingoland Districts has been three head. In the present case no special reasons have been advanced for a departure from this well established custom. So far as the Court is aware no movement has been made by the Fingo tribe generally in favour of increased damages being awarded.

The appeal is allowed with costs, the judgment in the Magistrate's Court altered to judgment for Plaintiff for three head of cattle or value £15. A tender of this number having been made, the Plaintiff will have to pay costs. Cattle tendered in settlement of the judgment to be subject to the approval of the Magistrate.

Umtata. 15 March, 1910. A. H. Stanford, C.M.

Mbemodala vs. Gingci.

(Ngqeleni).

Adultery—Bona fide *Marriage*—*Pondo Custom.*

Mbemodala sued Gingci for 5 head of cattle as damages for adultery with his wife named Mazizi. Defendant admitted that he was cohabiting with the woman in question but pleaded that he had married her having paid 2 head of cattle as dowry to her father Zake. Zake in his evidence stated that the woman was married first to Plaintiff but she "rejected" him and returned home, that he had informed Plaintiff of this fact and after receipt of a demand told him to take his cattle back but this Plaintiff refused: he did not send the cattle back to Plaintiff. He contended that his daughter's marriage with Plaintiff was dissolved when Defendant married her and stated that although the first dowry was in his possession he did not claim it.

Plaintiff denied that Zake had promised to return the dowry or told him that he could fetch it.

The Resident Magistrate gave an absolution judgment and his reasons were as follows:—

"The Defendant Gingci married Mazizi in good faith believing her to be free to contract a marriage. Under Pondo custom this fact would not free him from liability to the woman's husband if it were found that a previous marriage existed. In this case Plaintiff undoubtedly married Mazizi and if that marriage has not been dissolved he must succeed in this action. A marriage is dissolved by the return of the dowry cattle and the father of the girl cannot hold two dowries. Under Pondo custom a father wishing to dissolve his daughter's marriage is not expected to drive the cattle to the kraal of the woman's husband; on the contrary, the husband is required to demand the return of his wife or the dowry, and it is incumbent upon him to remove his dowry when offered to him. If he does not do so then under Pondo custom the cattle must be placed on one side by the father and kept until fetched by the woman's husband. Should the husband fail or neglect to remove his cattle the marriage is nevertheless dissolved and the woman is free to contract a second marriage.

"In this case I am satisfied that Plaintiff was offered the return of his dowry but refused or neglected to remove it. Probably he knew the girl would contract a second marriage and hoped to get cattle by claiming adultery damages. It is a significant fact that although a year ago he sent a letter of demand through an attorney to the girl's father demanding her return or the dowry he has taken no further steps up to the present time. This would appear to strengthen Zake's statement that when he received the demand he told Plaintiff to take back his cattle."

Plaintiff appealed.

Pres.:—The marriage of the woman Mazizi to the Appellant is admitted as well as the payment of dowry by him, and the dowry paid has never been returned, consequently at the time Respondent took the woman the marriage was still existing and Appellant has a clear right of action.

The issues in this case are completely covered by the judgment of the Appeal Court in the case of *Mguzazwe* vs. *Betyeka* also from the Court of Ngqeleni, heard on the 10th July, 1908 (N.A.C. Reports page 193).

The appeal is allowed with costs and the judgment in the Magistrate's Court altered to judgment for Plaintiff for three cattle or fifteen pounds and costs of suit, cattle if tendered to be subject to the approval of the Magistrate.

Umtata. 15 March, 1910. A. H. Stanford, C.M.

Nomlota vs. Mbiti.

(Ngqeleni.)

Woman's Earnings—Gifts—Apportionment of Property by Wife.

This was an action by Nomlota against his youngest son Mbiti for the recovery of certain cattle. Plaintiff stated that he had placed Defendant, while still a bachelor, in charge of one of his kraals in Libode's location at which he kept most of his cattle but since Defendant's marriage and the death of his (Plaintiff's) wife, Nomanti, Defendant now claimed all these cattle as his own. Plaintiff stated that these cattle were the earnings of his wife who had practised as a doctress.

Defendant claimed the stock as being in part allotted to him by his mother (Nomanti) and in part his own earnings.

The Magistrate's judgment was for Defendant with regard to some of the cattle and absolution in respect of the others.

Plaintiff appealed.

The Magistrate's reasons were as follows:—

"The cattle earned by Nomanti became the property of her husband Nomlota (Plaintiff) and she could not dispose of them without consulting him. During the lifetime of Nomanti cattle were, with the concurrence of Plaintiff, apportioned to the sons of the marriage including Mbiti (Defendant). The Court finds that the cattle for which judgment was given in favour of Defendant were acquired by him in the following ways:—

(1) By apportionment with Plaintiff's concurrence.

(2) As wages.

(3) By purchase.

(4) Progeny of above.

As regards the cattle for which Absolution was given the Plaintiff has failed to prove his case."

Pres.:—The kraal in Libode's location was established by Appellant at a time when according to Pondo custom Respondent was a minor and it appears to have been erected for the use of Appellant's

deceased wife. Respondent's contention that he built it himself is not borne out.

The Magistrate in dealing with the case has overlooked some very important features:

1. That the earnings of Appellant's wife were his property and could not be disposed of except by himself or with his express sanction.

2. That when the Respondent based his claim to the cattle in dispute upon alleged gifts by his father or by his mother with the sanction of his father, the onus of proof was removed from the Plaintiff in the case to the Defendant, and to succeed in face of the Appellant's strong denial the proof that he either gave the cattle personally to Respondent or sanctioned his wife's doing so must be clear and conclusive. Now the Respondent in his evidence in no instance states that his father was present on the occasions when he says the cattle were given to him by his mother.

On the question of probability it seems most unlikely that the Appellant would have given all the property, almost the entire earnings of his wife and its proceeds, to the Respondent who is a younger son, to the detriment of himself and his elder son by the same wife. This man as heir naturally would have had a considerable say in such a matter but none of the witnesses state that he protested or opposed the gifts to the younger son yet his consenting to the bulk of the property being diverted from him is more than can be expected from him. It is more reasonable to believe that on the death of the mother the Respondent being at the kraal where she died and in charge of all the property at that kraal endeavoured to retain possession of it.

This Court is of opinion that he has not substantiated the alleged gifts. The appeal will be allowed with costs, judgment in the Magistrate's Court being altered to judgment for Plaintiff with costs for 16 cattle (the Court here described the cattle) or value assessed at £6 each, absolution from the instance with regard to the balance of the claim. Cattle tendered in settlement to be subject to the approval of the Resident Magistrate.

Note.—The Supreme Court dismissed an application to review this decision).

Umtata. 15 March, 1910. A. H. Stanford, C.M.

Myendeki vs. Sidekwana.

(Ngqeleni.)

Isipipo Cattle—Pondo Customs.

Sidekwana sued his brother Myendeki for 10 head of cattle and the following were the allegations in his summons: —

1. That Plaintiff and Defendant are both sons of the late Zweni, Defendant being the eldest and Plaintiff the youngest son of the same hut.

2. That many years ago Defendant gave his mother a cow from the dowry of one of his daughters and that the said cow increased whilst in his mother's possession and has now a progeny of 9 head.

3. That their mother, Notesi, died last year when the mealies were getting dry and that their father is also dead.

4. That the mother being dead her cattle (isipipo) according to Pondo custom are the property of the youngest son.

5. That Defendant now wrongfully and unlawfully despoils Plaintiff of the said cattle.

6. That Defendant had a dispute about the same cattle with his younger brother Ngcambu who claimed them before Headman Stanford when Defendant stated that according to Pondo custom they are Plaintiff's property but that he now neglects and refuses to hand same over to Plaintiff or to pay their value. Wherefore Plaintiff prays that he may be adjudged so to do with costs of suit.

The Resident Magistrate gave judgment as prayed and Defendant appealed.

Pres.:—Both parties to the suit admit that an Isipipo beast was given to their mother from the dowry of one of her daughters. Respondent says it was a heifer and that the cattle he claims are the progeny of this animal. Appellant states that the animal given was an ox which was slaughtered as a sacrifice when his mother became ill.

The Native Assessors on being consulted state that the Isipipo beast and its increase are always the inheritance of the youngest son of the family, and that usually a breeding animal is given. Should the dowry be small and an ox be given it would at a later date be exchanged for a female beast.

The probabilities of the case strongly support the Respondent's claim while the evidence of the Appellant is contradictory and wholly unsatisfactory.

The appeal is dismissed with costs.

Umtata. 15 March, 1910. A. H. Stanford, C.M.

Qabazayo vs. Ncoso.

(Ngqeleni.)

Seduction—Ukumetsha—Nyoba—Pondo Custom.

Ncoso sued for 3 head of cattle or £15 as damages for seduction of his niece—a girl of about 16 years of age—and succeeded in the Magistrate's Court.

Defendant Qabazayo appealed.

In the Appeal Court the Native Assessors made the following statement of custom:—

"It is a common thing for a girl to be caught and in the old days it was 'Nyoba.' It is the custom for a girl to report to her mother when she has been seduced and she is then examined by the women, and if it is found that seduction has taken place sticks are taken by the women and one beast recovered as damages. If the girl did not report and it was afterwards found that she had been seduced she would be punished by being beaten. Damages are only claimed when the girl comes crying. 'Nyoba' would be paid for 'Metsha.' The scale of 'Nyoba' varies according to rank, it may be an assegai or a beast."

Pres.:—Apart from the bare statement of the girl (which is denied by the Appellant) that she had been seduced there is no evidence in support of seduction. The girl was not examined by the women in accordance with Native custom. The Court in the absence of any examination can only conclude that the girl was not seduced but was with the Appellant under the custom of "Ukumetsha" for which a claim for damages cannot be admitted. The action brought is really an attempt to recover an "Nyoba" fee."

The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for the Defendant with costs.

Umtata. 16 March, 1910. A. H. Stanford, C.M.

Mtanyana vs. Mzuzo.

(Umtata.)

Adultery—Collusion between Husband and Wife.

Mzuzo sued for 5 head of cattle as damages for adultery and pregnancy. Plaintiff alleged that there had been previous acts of adultery but that he had caught Defendant with his wife on the 6th September and had taken " tokens " from him.

Defendant denied the adultery and alleged that on the date in question the woman had asked him to escort her home and while doing this he had been assaulted by Plaintiff and his clothing taken away.

In the criminal case of assault instituted by Defendant the Plaintiff's wife stated that it was a preconcerted arrangement that she should entice Defendant to escort her home so that he could be caught.

Judgment was given as prayed and Defendant appealed.

At the November session (1909) the case was returned to the Magistrate for further evidence and to record a finding on the question whether there had been collusion between the husband and wife with regard to the act of adultery said to have been committed. After further evidence the Resident Magistrate found that collusion was established and re-submitted the case to the Appeal Court.

Pres.:—The evidence before the Court discloses that no act of adultery was committed on the occasion alleged, that there was collusion between the husband and wife to entrap Appellant into accompanying the woman in order that a charge of adultery might be brought against him.

The appeal is dismissed with costs and judgment in the Magistrate's Court altered to judgment for Defendant with costs.

Umtata. 16 March, 1910. A. H. Stanford, C.M.

Mtangayi vs. Mazwane.

(Xalanga.)

Adultery—Ownership of Adulterine Children—Second Marriages.

Mazwane sued Mtangayi for twelve head of cattle or £60 as damages for adultery with his wife Nowayile, and for an order to deliver to him certain four children born of the adultery.

The evidence showed that Plaintiff had married Nowayile and four children were born of this marriage, thereafter she was teleka'd by her father and Plaintiff went out to work for more dowry. On his return some years after he found that the woman Nowayile was living with Defendant as his wife and four children had been born of the adulterous union. Certain goats were paid by Defendant which it was alleged were received as " Ntlonze " and not as dowry. The father of the woman stated that he had made repeated attempts to recover her from Defendant.

The defence was that Nowayile had been driven away by Plaintiff on a charge of witchcraft and that Defendant had paid dowry for her. The woman refused to return to Plaintiff.

The Magistrate found that the marriage between Plaintiff and Nowayile was never dissolved and the stock received by Plaintiff were " Ntlonze " and not dowry. He gave judgment in the following terms:—

" For Plaintiff for the return to him of the four children born after Nowayile left him. One head of cattle of the value of £5 is awarded as damages in addition to the beast already received by Plaintiff. Costs against Defendant."

Defendant appealed, and Plaintiff cross appealed, apparently on the point of the amount of damages awarded.

Pres.:—The Court has always laid down the principle that under Native Custom a woman cannot contract a second marriage while the previous one is in existence. In the present case it is contended that the first marriage was dissolved by the husband having charged his wife with practising witchcraft and driven her away, but the wife's evidence is entirely unsupported and is contradicted by both her husband and her father. That the marriage was never dissolved is amply borne out, apart from other evidence, by that of Headman Ntsikana Mato, an independent witness.

It is clear then that Appellant and Respondent's wife have been living in an adulterous union and according to Native custom the children begotten by an adulterer belong to the husband.

The Magistrate's judgment is in accordance with Native custom and is supported by the evidence in the case.

The appeal is dismissed with costs.

On the cross appeal, Appellant paid to Skafu, which the latter says he received as proof of adultery, sixteen goats which he could receive only on account of Respondent. These added to the judg

ment of the Magistrate are in the opinion of the Court sufficient damages under the circumstances of the case.

The cross appeal is dismissed with costs.

Umtata. 16 March, 1910. W. T. Brownlee, A.C.M.

Rwamza vs. Ntlanganiso.

(Umtata.)

Adultery—Measure of Damages—Ill-Treatment—Delay in Instituting Action for Return of Wife

This was an action for adultery damages instituted by Plaintiff Rwamza. The Magistrate awarded one beast as damages and gave the following reasons:—

"In this case Plaintiff claimed from Defendant 5 head of cattle by reason of adultery with his wife. It appears from the evidence that the woman married the Plaintiff according to Native custom and that owing to ill-treatment which she received at his hands (and which Plaintiff admits) she left him and returned to her father, and that about two years ago she was married to Defendant. It is on record that the first marriage has never been dissolved as it is necessary that some portion of the dowry be returned in order to do so, and it is evident that, although Defendant paid dowry for her, he has been living in adultery with her as the first marriage cannot be legally regarded as annulled. It would seem that Plaintiff never treated this woman fairly. He admits that he ill-treated her and that she left him for that reason and he has, further, made no effort to get her back from her people nor is it likely that he will endeavour to get her back in the future."

"From the circumstances of this case I consider one beast ample damages to be awarded to the Plaintiff, in fact were it not that he is entitled to some award, I would have been inclined to give judgment in favour of Defendant. It will be noticed from the evidence of the woman's father that she had been living apart from Plaintiff for seven years when she married the Defendant."

Rwamza appealed on the point of damages.

Pres.:—In this case the Magistrate in the Court below is satisfied that the Plaintiff's wife left him because of ill-treatment

of her on his part, and this ill-treatment is in fact admitted by him, and for this reason as well as for the reason that the Plaintiff allowed his wife to remain with her father for a large number of years without making any effort to get her back the Magistrate has awarded only one beast as damages against the Defendant, and it is upon the point of the amount of damages awarded that the Plaintiff has appealed.

In view of the decision of this Court in the case of *Mtangayi* vs. *Mazwane* (Xalanga) heard on the 16th March, 1910, this Court is of opinion that the award of the Court below is sufficient and the appeal is dismissed with costs.

Umtata. 17 March, 1910. A. H. Stanford, C.M.

Feliti vs. Mkumbeni.

(Umtata.)

Adultery—Bona fide *Marriage*—*Method of Assessing Damages.*

Mkumbeni sued Koyi for £25 as damages for adultery with his wife. The Defendant contended that he had married the woman *bona fide* not knowing of any other marriage contracted by her.

The Assistant Magistrate awarded the full damages claimed and gave the following reasons:—

"In this case the Plaintiff claims from the Defendant the usual damages for adultery with his wife. It will be noticed on the last page of the evidence that it is admitted that the woman first married the Plaintiff and subsequently before the dissolution of this marriage she was given in marriage to the Defendant. The second marriage in reality is no marriage at all and the Defendant has undoubtedly been living in adultery with the woman by whom he admits that he has had one child and I have no doubt that when the Defendant took the woman to wife he knew of the former existing marriage and therefore the damages claimed are in my opinion not excessive."

Defendant appealed.

Pres.:—On the evidence there can be no question that the woman Nofayile was given in marriage to Respondent by her brother Xabakashe who at that time was guardian of this particular house of the late Titi, the heir to it, Mgoloqo, being then a

minor. It is also clear from the evidence that this marriage has never been dissolved. It follows therefore that the union entered into by the Appellant was an adulterous one.

Numerous cases of this nature have come before the sessions of the Native Appeal Court and the principle has always been affirmed that until the first marriage is legally annulled the woman cannot contract a second marriage and any man taking her, although he may pay cattle under the name of dowry to the woman's father or guardian, can only be regarded in the light of an adulterer. In the awarding of damages there are various circumstances which are taken into consideration: The conduct of the husband, such as ill-treatment and long neglect of his wife, whether there are or not reasonable grounds for supposing the second man taking the woman was or was not aware of the existing marriage, and the presumption, unless rebutted, is that he had such knowledge and under such circumstances is not entitled to consideration.

In the present case the Magistrate has found that the Appellant was fully aware of the marriage and consequently liable to ordinary damages. This Court after careful consideration of the evidence and the fact that Appellant's family and that of Titi are near neighbours sees no reason for disagreeing with this view.

The appeal is dismissed with costs.

Umtata. 17 March, 1910. W. T. Brownlee, A.C.M.

Capuko vs. Ngazulwane.

(St. Marks.)

Adultery—Ntlonze—Quarrels as Catches—Damages—Women past Child-Bearing.

Capuko sued Ngazulwane for the delivery of two head of cattle left with Defendant by Plaintiff for safe-keeping and £1 damages for wrongful use of these oxen in ploughing operations.

Defendant admitted that he had the two cattle in question but contended that he was entitled to use them until the settlement of his claim in reconvention, and he thereupon claimed in reconvention 3 head of cattle as damages for adultery with his wife Notawuli. In support of his claim in reconvention Defendant stated that he had seen Plaintiff and another man fight in the

presence of his wife. The woman Notawuli stated she was past child bearing, that she had two lovers,—Plaintiff and a man named Tibani—and that on one occasion these two "bulls" had a fight.

The Magistrate ordered Defendant to restore one beast and pay 7/6 damages for the use of the oxen and Plaintiff to pay one beast as damages for adultery set off in the judgment and adjudged costs against Defendant.

On the question of damages awarded, the Magistrate in his reasons said that as Notawuli was past child bearing whatever damage her husband has suffered can only be regarded as moral and intellectual and not material.

An appeal and cross appeal were noted.

Pres.:—In this case the Plaintiff claims the delivery of two head of cattle which he states Defendant has in his possession and consequently detains from him, and the sum of £1 for the unlawful use of the cattle. The Defendant does not deny that he has the two cattle in his possession but puts in a claim in reconvention for 3 head of cattle for damages for adultery on the part of the Plaintiff with his wife.

The Magistrate holding that adultery has been proved and holding also that because Defendant's wife is past child bearing the Defendant is only entitled to one beast as damages has given the following judgment: "The Defendant is ordered to restore to Plaintiff one head of cattle and to pay 7/6 damages for use of oxen. Plaintiff to pay one beast as damages for the adultery set off in this judgment, Defendant to pay costs of suit." On this judgment the Plaintiff appeals and the Defendant cross appeals. The cross appeal is brought in respect of the amount of damages allowed the Defendant in his claim in reconvention.

In this case in connection with the claim in reconvention there has been no catch made or Ntlonze taken such as is usual but the Defendant relies in proof of his claim mainly upon the fact alleged in evidence that there was a quarrel between Plaintiff and another man named Tibani over Defendant's wife. The various points involved in this case having been put before the Native Assessors they give the following statement of Native Law:

1. Where two married women quarrel over the husband of one of them, the husband of the other may regard it as a catch and may claim damages.

2. Where two men quarrel over a married woman the husband of such woman may regard it as a catch and may claim damages from both of them.

3. There is no difference in the amount of fine paid for adultery with a woman already past child bearing from that paid for any other married woman.

Under these circumstances this Court can see no reason to interfere with the decision that there has been adultery between Plaintiff and Defendant's wife. There is evidence to support this finding and this Court cannot say that the Magistrate has erred in believing it.

On the point raised in the cross appeal, however, this Court is of opinion that the Defendant is entitled to succeed and that the usual damages are to be paid whether the woman be past the age of child bearing or not.

The appeal is dismissed and the cross appeal is allowed with costs and the judgment in the Court below altered to judgment for Plaintiff in convention for 2 head of cattle and for Plaintiff in reconvention for three head of cattle or value £15 and costs, in effect for Plaintiff in reconvention for one beast or value £5 and costs.

Umtata. 17 March, 1910. W. T. Brownlee, A.C.M.

Boko vs. Magononda.

(Engcobo.)

Estates—Succession—Apportionment of Sons.

Magononda sued Boko for the recovery of 13 cattle and 50 sheep the property of the estate of Nyatela, his cousin, whose heir he claimed to be. The cattle claimed were the dowries received for the two daughters of Nyatela and the sheep also belonged to the estate.

Defendant admitted having 48 sheep and 10 cattle, and the Magistrate gave judgment for these animals.

Defendant appealed and Plaintiff cross appealed.

The Magistrate's reasons were as follows:—

"Plaintiff claims certain stock admittedly belonging to estate of one Nyatela. Court finds that Plaintiff is eldest son of Ntsabo who was eldest son of Mduna, eldest son of Zonyane who was father of

Defendant. The question for decision is ' Who succeeds to estate of Nyatela who left no son? '

" Plaintiff states that Mpuku, father of Nyatela, was allotted to Mduna. Defendant claims on the ground that he, Boko, was allotted to Mpuku. Court is of opinion that on failure of sons, property goes to the father or his representative and does not go to a younger brother as Defendant admittedly is.

" Court is of opinion that Plaintiff is heir of Nyatela who left no son, being in the direct line of the eldest son of Zonyane, quite apart from his allegation that Mpuku was allotted to his (Plaintiff's) grandfather Mduna.

" As regards the Cross Appeal: Plaintiff produces no evidence except that of women, as to the dowry paid, hence Court accepted Defendant's admission as to the stock in his possession."

Pres.:—The Plaintiff is this case is the grandson and heir of Mduna the eldest son of the late Zonyane and Defendant is the youngest son of the late Zonyane and the claim is in respect of the estate of the late Nyatela the grandson of Mpuku, the third son of the late Zonyane, who died without male issue, and of which the Defendant has possessed himself.

Zonyane had six sons in the following order:

1 Mduna, 2 Mbabe, 3 Mpuku, 4 Ntshwila, 5 Pangula (deceased) and 6 Boko. Plaintiff is grandson of Mduna and the late Nyatela is grandson of Mpuku, and Boko is Defendant. Plaintiff claims the estate of Nyatela not only by virtue of the fact that he is the representative of the eldest son of the late Zonyane and therefore the heir of the house of Mpuku in the absence of any heir in the direct line, but also by virtue of the fact that the late Zonyane made an apportionment of his three younger sons, Pangula having died, to his two elder sons, Mduna and Mbabe, and as Mpuku was apportioned to Mduna the estate of Mpuku or of any of his descendants, failing direct male heirs, would devolve upon the house of Mduna of which Plaintiff is the heir. He states that the apportionment was made in the following manner: Mpuku and Boko were apportioned to Mduna, and Ntshwila was apportioned to Mbabe.

Defendant on the other hand states that Mtshwila was apportioned to Mduna, Pangula was apportioned to Mbabe and he, Defendant, was apportioned to Mpuku and that therefore he is heir to the house of Mpuku which is now without male representatives.

It seems clear, then, as each party alleges an apportionment by

the late Zonyane of his sons that there was such an apportionment. The Magistrate has given judgment for the Plaintiff on the ground that he is in the direct line of the eldest son of Zonyane and therefore the heir of Nyatela who left no heir of his own house, and the Defendant has appealed against this decision.

The points at issue in this case having been put to the Native Assessors they give the following statement of Native custom:

"Where a man has many sons of one house and makes an apportionment of such sons there are two sons to whom their brothers are apportioned. There is first the eldest son who is the heir and the third son is allotted to him. There is next the second son. He is called the son of the pots (Unyana wo mpanda) and the fourth son is allotted to him. If there be yet more sons they are given to the eldest son. This is the invariable custom and no other son than the first and second has brothers apportioned to him."

The Appellant's Attorney has made an application that the case be remitted to the Court below for the purpose of enabling him to produce further evidence but in view of the foregoing statement of custom this Court cannot see what is to be gained by remitting the case or by receiving further evidence as whether by virtue of rank or by virtue of allocation Plaintiff is entitled to succeed, and no allocation contrary to custom can stand. The appeal is dismissed with costs.

The Plaintiff has brought a cross appeal on the question of cattle allowed him by the Magistrate in his judgment. The Magistrate seems to have been doubtful of the evidence of the Plaintiff as to the number of cattle stated by his witnesses to be in possession of the Defendant, and gave judgment against the Defendant for only the number admitted by him to be in his possession, and the Court is not in a position to say the Magistrate is wrong in his findings on the evidence, and the cross appeal is also dismissed with costs.

As, however, there is independent evidence procurable as to the actual number of cattle paid for the two daughters of Nyatela, Maliwe and Nonqonqoza, and of which Defendant possessed himself, in dismissing the cross appeal the judgment of the Court below will be so amended as to be one of absolution only in so far as the three cattle claimed and not allowed are concerned.

Umtata. 18 Mareh, 1910. W. T. Brownlee, A.C.M.

Mhlwiti Kwaza vs. Nofesi.

(Elliotdale.)

Succession—Great House and Qadi House—Seed Bearers—Institution of Heirs.

Mhlwiti Kwaza sued Nofesi, a widow, for 18 cattle or £90, £10 damages, and also a declaration of rights with regard to the property of the Qadi House of his late father.

In his summons he alleged that he was heir of his late father, Kwaza, being the eldest son of the Great House, that defendant was the Qadi wife of the Great House, and had no male issue, and that since the death of Kwaza the stock claimed had been retained by the widow Nofesi, who refused to give them up or recognise Plaintiff as heir of the estate.

The defence was that the proper heir was a son named Vulukwene, whose mother was put into the Qadi House to raise seed for that house, and that in addition Vulukwene had been instituted as the heir of the Qadi House by Kwaza himself at a meeting of the relatives.

The Magistrate decided in favour of Defendant, and his reasons were as follows:—

"In this case Plaintiff sued Defendant, a Qadi widow of his father, claiming 18 head of cattle, or their value, and £10 damages. Kwaza, Plaintiff's father, died about 1902, and at his death had a kraal at Bashee, where Defendant still resides, and another at Bulembo, where Plaintiff resides, leaving six head at Defendant's kraal. Of this number he states four were in the Great House, of which he is the heir, and which increased to number now claimed. In June, 1904, he brought a case against present Defendant, in which he stated that it was not a question of any claim to the cattle, but simply because Defendant would not recognise his right as administrator of the estate, and that the majority of the cattle belonged to the Defendant's house. From the evidence it appeared that there were six head of cattle in the Qadi house at the death of Kwaza. Some years previously, as Defendant had borne him only daughters, he called a meeting of his clan, and instituted Vulukwene, the second Qadi's son, as heir to Defendant, evidently foreseeing that if he did not do so,

the Defendant, whose daughters dowries had enriched, would be left utterly destitute. The witnesses who gave evidence for Defendant as to the meeting being held and Vulukwene instituted heir to Defendant were all closely related to the Plaintiff, and frankly admitted that had this not been done Plaintiff would have been heir. The fact of Plaintiff now wishing to deprive the widow of the stock, and the nature of the previous actions brought by him, point to the conclusion that Kwaza did institute Vulukwene the heir. Vulukwene is a young man, and states that he expects to be circumcised next year. The weight of evidence and the probabilities of the case being in favour of Defendant, judgment was entered for her accordingly."

Plaintiff appealed.

Pres. :—In this case the Plaintiff is the eldest son of the Great House of the late Kwaza, and defendant is the widow in the Qadi House of the late Kwaza. Defendant had no son, but several daughters, who have been married, and Defendant holds certain cattle of the dowries of these daughters, and the Plaintiff claims from her certain 18 head of cattle, 14 of which, he states, belong to the Great House and 4 of which belong to the Qadi House, of which he states he is the heir by virtue of his rank and station.

The defence is that all the cattle in the possession of Defendant are the property of her own house, and that that house has an heir—Vulukwene, the son of Nunuse, the wife in another Qadi House of Kwaza, and who was installed as heir by Kwaza in Defendant's house. Some of the witnesses for the defence state that the woman Nunuse was married as a seed bearer to Defendant, but they also state that her son Vulukwene was installed as the heir of Defendant's house.

The Magistrate in the Court below does not seem to have gone very far into the question of the number of cattle now in the possession of Defendant, but relying upon the evidence of an institution of Vulukwene as heir to the house of Defendant, has given judgment for Defendant.

The Court has put the following questions to the Native Assessors, Sidiki, Koyi, Hlakanyana, E. Bam and Kala Matyeleni :—

1. Is it customary to appoint a seed bearer to a Qadi House, there being an heir in the principal house?

2. Is it usual to appoint an heir to a Qadi House where there is an heir to the principal house of that Qadi?

The following replies have been given:

1. It is not customary to establish a seed bearer to a Qadi; there cannot be one Qadi upon another Qadi.

2. It is not customary when there is an heir in the Great House, and no heir in a Qadi House, to appoint an heir into that Qadi House from another Qadi. It is sometimes attempted to do this, and it is invariably the cause of litigation, and the judgment is always in favour of the son of the Great House.

In the face of this statement of Native custom, this Court does not see how the defence can succeed in the contention set up.

The appeal is allowed with costs, and the judgment of the Court below altered to judgment for Plaintiff, with costs, the Plaintiff being declared to be the heir of the Defendant Nofesi. As, however, it is not clear from the evidence what cattle there are in this house, the case is remitted to the Court below to enable the Magistrate to take evidence and decide as to the number of cattle to be allowed to Plaintiff, who is ordered to suitably maintain the Defendant.

Umtata. 18 March, 1910. W. T. Brownlee, A.C.M.

Mkohlakali vs. Mashini.

(Elliotdale.)

Adultery Damages—Part Settlement of Claim—Claim for Balance.

Mashini sued for two head of cattle, being balance of damages due to him for adultery, one beast already having been paid.

Plaintiff obtained judgment in his favour, and Defendant appealed.

Pres.:—In this case Plaintiff sues for damages for adultery. He states that he caught Defendant in the act, and took his blanket from him, and that upon the Defendant paying him one beast he returned him his blanket, on the promise that more cattle would be paid, and he now claims two head more. The Defendant admits the adultery, but states that he has settled the case in full by the payment of the beast. The Magistrate has given judgment for the Plaintiff for two head of cattle, but this Court is not satisfied that this judgment should stand.

It is always held that in cases of this kind, where an injured

husband has accepted payment of any sort, he is regarded as having accepted payment in full, unless he formally reports to the Headman that the payment made is only in part settlement.

In this case the Appellant accepted one beast and parted with the Ntlonze, and he must be regarded as having accepted the animal paid in full settlement.

The appeal is allowed with costs, and the judgment of the Court below is altered to judgment for Defendant, with costs.

Umtata. 19 March, 1910. W. T. Brownlee, A.C.M.

Gasa vs. Ginyo.

(Mqanduli.)

Practice—Provisional Judgment Re-opening—Kraal Head Responsibility.

In the original case Ginyo had sued Wood Gasa and his father, Simon Gasa, for damages for seduction. The first Defendant was in default, and the second Defendant, Simon Gasa, admitted guardianship, and pleaded the general issue. The Magistrate gave a provisional judgment.

In the present action Simon sought to reverse this judgment, in order that the principal case might be gone into on its merits, and the plaints in his re-opening summons read as follows:—

1. That on the 7th of October last the said Plaintiff appeared before the said Court and pleaded to a certain summons issued out against a son of the Plaintiff, one Wood Gasa, assisted by the said Plaintiff, for damages for seduction, in which plea Plaintiff admitted that he was the guardian of the said Wood Gasa.

2. That by such admission the Plaintiff meant that the said Wood Gasa had not a kraal of his own, and was not resident at Plaintiff's kraal, and furthermore that the said Wood Gasa was living abroad, earning his living, and was thus emancipated, his plea being misunderstood by the said Court.

3. That the said Plaintiff is a Christian, having abandoned all Native rites and customs, and as such is not liable for the torts committed by the said Wood Gasa, who is of age. Wherefore the Plaintiff prays that the said provisional judgment may be set aside, and the case be tried on its merits, and prays for costs of suit.

The following exception was taken to this summons: —

" Defendant takes exception to the said Plaintiff's summons as being bad in law, in that he seeks to have set aside a certain provisional judgment obtained against him in this Court by present Defendant on the 7th October last past, and further prays that the case may be tried on its merits. That applications to have provisional judgments set aside are governed by Section 29, Schedule B. of Act 20 of 1856, to which the Court is referred. That none of the grounds set forth in the said Section 29 are averred or urged in said Plaintiff's summons or application, hence it is bad in law. Wherefore said Defendant prays for the dismissal of Plaintiff's summons with costs.

The Magistrate allowed this exception, and dismissed the summons.

Plaintiff Simon appealed.

Pres.:—The main principles involved in this case are very clearly set forth in the case of *Nteteni* vs. *Ngantweni*, heard in this Court on the 10th March, 1908, in which it is laid down that " the responsibility of the head of the kraal for the torts com- " mitted by the members of his kraal is a condition peculiar to " Native custom, and there is no corresponding position to be " found in Colonial law. The term ' joint tort feasor ' is wholly " inapplicable to such cases, as it cannot be maintained or shown " in any of the cases that the head of the kraal is a participator " in the tort committed." In the case of *Toyise* vs. *Soviti*, heard on the 7th July, 1908, it was decided that no greater judgment could be given against a kraal head co-defendant than against the tort feasor, yet this is in effect what is being done in this case now before the Court by means of strictly applying the provisions of Act 20 of 1856, in refusing the application for the re-opening of the provisional judgment against the Defendant— Appellant.

Had Colonial law only been applied in the original instance, no judgment whatever could have been obtained in this case against the Appellant, and it is only by going outside of Colonial law, and having recourse to Native law and custom, that a judgment has been obtained against him at all. Now that he seeks to avail himself of the provision made by statute law to have the provisional judgment re-opened, it is endeavoured to prevent him from doing so because of the technicality that the particulars of

this case are not covered by provisions of Section 29, Schedule B. of Act 20 of 1856, since the Appellant was not in default when a provisional judgment was given against him, and for that reason he may not allege any of the grounds provided for in that section.

The true situation seems to be that the Appellant is, under the judgment of the original case, liable as a quasi surety for the fulfilment of that judgment, the first Defendant being the principal judgment debtor. The latter would clearly under the circumstances set forth have the right to reopen the provisional judgment, and this being so, it must be held that the Appellant, who is made responsible only by the peculiar condition of Native law already referred to, should have the same right, and as the Appellant avers that he has a good defence, in so far as he himself is concerned, it would be a very serious injustice to prevent him having the opportunity of going into that defence, and this Court exercising its powers of review allows the appeal, and the ruling on the exception is set aside, and the case remitted to the Court below to be heard on its merits.

As, however, it was competent for the Appellant to have set up in the original case the defence which he now desires to have gone into, he will have to bear the costs of this appeal.

Umtata. 21 March, 1910. W. T. Brownlee, A.C.M.

Skeyi vs. Mxamleni.

(Mqanduli.)

Injuries to Stock—Replacement—Ownership of Carcase of Animals Injured.

Mxamleni sued for the delivery of the carcase of a certain heifer or value £2. He stated that while he was performing his duties as a herd he accidentally killed a young heifer, the property of Defendant; that immediately thereafter he reported the matter to Defendant, and reimbursed him by paying a heifer of equal age and value; that according to law he is entitled to the carcase of the animal killed, but Defendant refuses to hand it over.

Defendant admitted the receipt of an animal in reimbursement, but denied that it was the custom to hand over the injured animal.

The Magistrate held it was the custom for the person who made good the damage to receive the carcase, and gave judgment in favour of Plaintiff.

Defendant appealed.

Pres.:—The points involved in this case being put to the Native Assessors, they state that under Native custom:—

1. The damages belong to the man who replaces the injured animal.

2. That there is no exception to this rule, even if there be delay in replacing the injured animal.

3. Nor is there any exception even if the animal paid is smaller and of less value than the one which it replaces, if the owner of the latter accepts it.

4. The original owner should not consume the carcase before the matter has been settled. If there is any dispute he should leave it to be eaten by the birds.

In view of the foregoing this Court is satisfied that the Plaintiff is entitled to the carcase of the animal that he injured, and sees no reason to interfere on the point of the value placed upon it by the Court below.

The appeal is dismissed with costs.

Umtata. 21 March, 1910. W. T. Brownlee, A.C.M.

Dledle vs. Nongabada.

(Mqanduli.)

Adultery—Evidence—Custom of Reporting Pregnancy of Woman Under Teleka.

This was an action for five head of cattle as damages for adultery committed whilst the woman was under teleka.

The Magistrate gave an absolution judgment, on the grounds of insufficiency of and discrepancies in the evidence.

Plaintiff appealed.

Pres.:—In this case the judgment seems to be against the weight of evidence. There is first of all the undisputed fact that the woman Nondamse has an illegitimate male child. Then there is the fact that various witnesses saw the Defendant cohabiting with her (Nondamse), and there is also evidence that a message

was sent to Defendant reporting the woman's pregnancy to him, but that on that occasion he could not be found by the messenger.

The apparent discrepancy between the evidence of the woman and her father is easily explainable. It was the duty of the father of the woman to report her condition to her husband, and he says he did so. The woman is quite correct in saying it is not customary for a woman to report her condition to her husband when she is with child by any act of adultery—he has to find it out for himself.

The appeal is allowed with costs, and the judgment of the Court below altered to judgment for Plaintiff as prayed, with costs.

Umtata. 21 March, 1910. W. T. Brownlee, A.C.M.

Mjatya vs. Holomisa.

(Mqanduli.)

Native Chiefs and Headmen—Fees for Hearing Case.

Holomisa, a Native Chief, decided an action for adultery damages brought before him by Defendant, in which he gave judgment for three head of cattle. This judgment had been duly satisfied, and Holomisa contended that he was entitled under Native custom to receive from Defendant one beast as his fee. He alleges that Defendant had promised to pay this animal, but now refused.

An exception was taken by Defendant's attorney that the agreement to pay the animal in dispute was "immoral, illegal, and *contra bonos mores*," and moreover no consideration was alleged in the summons.

The Magistrate overruled this exception, and gave judgment for one small beast, or value 30s., on the ground that under Native custom Chiefs and Headman were entitled to a fee for deciding cases, and no alteration of this custom had been made.

Defendant appealed.

Pres.:—In this case this Court does not see how the Plaintiff can possibly succeed, as he has no authority to demand fees for hearing cases. The judgment of the Court below is altered to judgment for Defendant with costs.

Umtata. 21 March, 1910. W. T. Brownlee, A.C.M.

Zenzile vs. Bokolo.

(Mqanduli.)

Adultery—Ntlonze—Quarrels as a "Catch"—Prescription.

This was an action for three head of cattle as damages for adultery committed during October, 1907. Plaintiff stated he did not actually "catch" the parties, but based his claim on the ground that his wife and Defendant's wife fought because the latter accused the former of illicit intercourse with Defendant. He stated that he did not bring the action earlier because he had no funds.

The Magistrate gave judgment for Defendant, as the adultery had not been proved, and there was no catch.

Plaintiff appealed.

Pres.:—In this case there was no catch and no token, but the Plaintiff relies upon a quarrel between his wife and Defendant's wife as a catch.

The Native Assessors state when two women quarrel over the husband of one of them it is a catch for the husband of the other, but that if a man allows an action of this kind to lie for many years, he is not entitled after a lengthy silence to bring his case. The only circumstances which would justify delay would be that his case had been hung up by the Court.

This Court is of opinion that, though the quarrel between the wives of Plaintiff and Defendant, if proved, would have constituted a sufficient catch, the Plaintiff is not entitled after the lapse of over two years to bring this action.

The appeal is dismissed with costs.

Umtata. 23 March, 1910. W. T. Brownlee, A.C.M.

Pato vs. Pato.

(Qumbu.)

Succession—Apportionment of Sons—Meeting of Relatives.

The case for decision is set out in the following judgment of the Appeal Court:—

Pres.:—The claim in this case is founded upon an alleged distribution by the father of the parties to the suit of his various children, and the point being put to the Native Assessors, at the request of Appellant's attorney, they state that in the event of the death without heirs of any brother who had been apportioned by his father his estate would be inherited by the brother to whom he was apportioned. They also state that it is not in accordance with custom that a father who is about to make an apportionment of his children should not call in his brothers to witness the apportionment, the calling together of relatives being necessary, so as to provide witnesses in case of disputes after the father's death.

The Magistrate in the Court below is satisfied that the apportionment alleged by Plaintiff was made, and with this finding this Court—in view of the evidence of the Defendant himself, even though there seems to have been no meeting of relatives—concurs, and this Court is of opinion that the judgment of the Court below should stand.

The appeal is dismissed with costs.

Umtata. 23 March, 1910. W. T. Brownlee, A.C.M.

Binza vs. Mqekeza.

(Engcobo.)

Adultery—Native Marriage in Colony Proper—Damages.

Binza sued for three head of cattle as damages for adultery with his wife, whom he had married by Native custom in the Colony Proper. Defendant excepted that the Summons disclosed no grounds of action, as so-called marriages according to Native law and custom outside the Territories are invalid, and consequently no action for adultery damages can arise out of such marriage. In support of his exception he quoted *Malgas* vs. *Gakavu* (6 E.D.C. 225), *Koytyo* vs. *Sidaru* (7 E.D.C. 186), and *Nyqobela* vs. *Sihele* (10 S.C. 346).

The Magistrate sustained the exception, and gave the following reasons:—

"In case *Flara Silo* vs. *Mdloyi* (Native Appeal Court, 20th July, 1903), Court declined to assist a resident of the Colony

to recover his wife or dowry paid for her, as the marriage, according to Native custom, took place in the Colony. This decision was confirmed in the case *Witbooi Selana* vs. *Skeyi Kayingana* (Appeal Court, July, 1905).

"In the present case the marriage admittedly took place in the Colony, the only difference being that it appears the parties now reside in this district. If the marriage contracted in the Colony is illegal, the fact that the parties now reside in this Territory cannot cure the illegality of the marriage."

Plaintiff appealed.

Pres.:—The principles involved in this appeal were decided in the case of *Rasmeni* vs. *Plaatye* (N.A.C. 30), which was precisely on all fours with this case.

There the Appeal Court held, confirming the judgment of the Court below, that a Native having contracted a Native marriage in the Colony, and subsequently removing into the Territories, is entitled to sue for damages for adultery with the woman he has married in the Colony according to Native custom.

The appeal is allowed with costs, and the exception dismissed with costs. The case is remitted to the Court below to be heard upon its merits. (Vide *Jeke* vs. *Judge*, 11 Juta, p. 125.)

Kokstad. 21 April, 1910. W. T. Brownlee, A.C.M.

Lucani vs. Mbuzweni.

(Mount Ayliff.)

Dowry Restoration—Engagement to Marry—Default—Forfeiture.

Lucani sued Mbuzweni for the restoration of eight head of cattle paid him on account of dowry in a marriage arranged between Plaintiff's son and Defendant's daughter. Plaintiff stated that he arranged the marriage while his son was still at school, and paid the dowry, but his son on arrival home refused to ratify the arrangement, and on this ground he claimed his cattle back.

Defendant pleaded that the son had duly ratified the agreement, but later on he (the son) broke off the engagement, and by his refusal to carry out the marriage the cattle were forfeited.

The Magistrate gave judgment for defendant, and furnished the following reasons:—

"In this case it is quite clear that the agreement entered into by Plaintiff and Defendant was ratified by Plaintiff's son, who subsequently broke off the engagement and refused to go on with the marriage. It has been laid down that, though by Native custom until the contract of marriage is fulfilled the ownership of cattle given as lobola remains in the intended husband during the existence of the contractual obligation, the father of the intended wife has such an interest in the cattle as to entitle him to retain possession thereof. This right of retention becomes converted in certain eventualities into a right to the *dominium*, as in the case of the fulfilment of the contract, as also where the contract is broken by the intended husband (*vide* case of *Wm. Notwa* vs. *S. Vuba*, p. 15, Warner's Reports). The Plaintiff's contention, however, is that he is entitled to the return of some of the cattle paid, and he quoted the case of *Mlahliwe* vs. *Gobozana* (p. 10, Warner's Native Appeals). Even if the ruling in that case is correct (and I am of opinion that it is not), the question of the rank of the Defendant should be taken into consideration in construing the meaning of the words 'several cattle.' In this instance the defendant is the eldest surviving son of the late Jojo, Chief of the Xesibe people, and virtually the principal man in the district, so that seven cattle cannot be said to be much more than a small portion of the dowry."

Plaintiff appealed.

Pres.:—In this case it is clear that the Plaintiff's son Simon was a consenting party to the proposed marriage. When he was informed of it he expressed his approval, and after this approval the bulk of the dowry was paid.

The leading decision in cases of this nature is that of *Nojiwa* vs. *Vubu* (Henkel, p. 57), in which the father of the girl was allowed to retain the whole dowry paid by the father of the bridegroom.

It is clear that Plaintiff's son broke off the intended marriage, and that he did so without cause.

The appeal is dismissed with costs.

Kokstad. 21 April, 1910. W. T. Brownlee, A.C.M.

Daniel and Another vs. James Jack.

(Tsolo.)

Procedure—Grass Burning—Torts—Father's Liability.

In an action by James Jack against Daniel, "assisted by his father and lawful guardian, Majuba, hereinafter styled the Defendants," the Summons read as follows:—

1. That the second named Defendant is the father and lawful guardian of the first Defendant, and as such is liable for the torts of the latter.

2. That on or about the 8th August, 1909, the first Defendant, Daniel, did wrongfully and wrongfully and negligently set fire to the grass in or in the vicinity of Zono's Location, which grass fire spread to the said Plaintiff's kraal, and there burnt and destroyed the articles set forth in the list hereto attached.

3. That through this wrongful and negligent action Plaintiff has sustained damage in the sum of £31 5s. 6d., the value of the articles aforesaid, which amount Defendants neglect and refuse to pay: Wherefore Plaintiff prays that they may be adjudged to pay same with costs of suit.

The plea was general issue.

The Magistrate's judgment was "for plaintiff for £30 16s. and costs of suit."

Defendant appealed.

Pres.:—In this case the points raised on appeal are:—

1. That Majuba has not been cited to appear before the Court and to answer the Summons, but merely to assist the Defendant Daniel, and that therefore it is not competent for the Court to give judgment against him.

2. That there is no evidence as to the value of the articles said to have been burned; and

3. That this case should have been treated under the common law of the Colony.

But this Court is of opinion that though Majuba was not specifically joined as Defendant with Daniel in the joint clause of the summons, yet it is perfectly clear from the body of the summons that he was called upon to answer the claim laid in the summons, and that he himself by pleading to the summons understood this, and so considers that it was competent for the Court below to give judgment against him.

On the second point the value placed upon the articles does not seem to have been called in question in the Court below, and this Court does not see any reason to disagree with the decision of the Court below on this point.

On the last point, it is in accordance with Native custom that a person whose property has been injured by a grass fire should recover damages from the person who set the grass alight. And it is clear that the boy Daniel at least took part in the grass-burning which caused the injury to Plaintiff's property.

The appeal is dismissed with costs.

Kokstad. 22 April, 1910. W. T. Brownlee, A.C.M.

Ziyendani vs. Mtoto.

(Umzimkulu.)

Ukungena Custom—Children's Rights—Illegitimate Children—Baca Customs.

Plaintiff in this action, Ziyendani, was the eldest son of the late Kele by the Chief Hut. Kele had had three wives, the third of whom was named Mazuma (2). Defendant Mtoto was the son of Mazuma (2) by a man named Ntonga. At Kele's death there was no issue in the hut of Mazuma (2). Ntonga by his intercourse with Mazuma (2) had had three sons and two daughters, of whom Defendant was the eldest. Certain property, partly from dowries of the two daughters and partly as earnings of the other two sons, who had died without issue, had accrued in Mazuma's hut, and Plaintiff claimed to be heir of the property by virtue of his position as eldest son of the Chief Hut, but Mtoto contended that as he was the son of an "ukungena" union between Mazuma (2) and Ntonga, he was the rightful heir. Plaintiff alleged that Ntonga was never appointed as seed-raiser, and described him as "distantly related to the late Kele." Defendant called him a "cousin."

The parties belonged to the Amabele clan of the Baca tribe.

The Magistrate gave judgment as follows:—

"Plaintiff declared to be the heir of the hut of Mazuma (2), excepting the property earned by the sons of the hut (by Ntonga), which property the Court declares Plaintiff not entitled to. Defendant to pay costs."

In his reasons he said:—

"It would appear that according to the Baca custom it is necessary that a seed-raiser should be formally appointed before any issue can succeed to the property of the hut concerned. The evidence by no means supports the contention that any ceremony was held. In fact it is clear from that given for the defence that if ever held at all it was certainly after the birth of Defendant.

"The Court also held that the Plaintiff was not entitled to any property actually earned by the illegitimate sons of the hut of Mazuma No. 2."

Defendant appealed, and Plaintiff cross appealed on the point of cattle earned by the sons of Mazuma by Ntonga.

Pres.:—In this case the Magistrate in the Court below has held that the man Ntonga was not instituted as seed-raiser in the house of Mazuma No. 2, and has given judgment for the Plaintiff as regards the property of the house of Mazuma No. 2, and this Court sees no reason to interfere with this part of the judgment. As to whether the man Ntonga had been instituted or not, it does not appear, in the light of the judgment in the case of *Manyosini* vs. *Nonkanyezi* (Henkel, p. 114), that even had he been so instituted his son would inherit to the exclusion of the Plaintiff. And in the opinion of this Court Plaintiff was rightly decided to be the heir in the house of Mazuma No. 2. It follows then that he should inherit also any property of the sons of that house who may have died without issue, and this Court is of opinion that the Plaintiff ought to have succeeded in his claims to the property of the late Gwempe.

The appeal is dismissed, and the cross appeal is allowed with costs, and the judgment of the Court below altered as to read Plaintiff declared to be the heir of the house of Mazuma No. 2, and as such entitled to the estates of such sons born to Mazuma No. 2 by Ntonga as have died without male issue.

Defendant to pay costs.

Kokstad. 23 April, 1910. W. T. Brownlee, A.C.M.

Mzwakali vs. Mahlati.

(Mount Frere.)

Seduction and Pregnancy—Second Pregnancy—Scale of Damages—Baca Customs.

Mzwakali sued for three head of cattle, or £15, as damages for seduction and pregnancy.

As the girl in question had had a child before the Defendant contended that the damages should be one beast, which he tendered.

Plaintiff refused the tender of a young animal as insufficient.

The Magistrate held the tender to be sufficient under Baca custom, and gave judgment accordingly.

Plaintiff appealed.

Pres.:—This Court is not aware of any custom under which only one beast is payable as damages in the case of a second pregnancy, and is further of opinion that the Magistrate should have allowed the Plaintiff more than one beast, and in any case the tender of a yearling calf is quite insufficient.

The decision in the case of *Ramba* vs. *Pumani Dwe* (Henkel, p. 161) does not apply in this case, as in the former the Plaintiff accepted the award of the Headman, and the fine paid under this award, while in this case the Plaintiff at once rejected the beast tendered by the Defendant.

The appeal is only on the point of the value of the beast, and not on the number, so this Court will not increase the number awarded, but the appeal will be allowed with costs, and the judgment of the Court below so amended as to order the payment of a full-grown beast or its value, £5, with costs.

Flagstaff. 27 April, 1910. W. T. Brownlee, A.C.M.

Ngalweni vs. Mpelo.

(Bizana.)

Damages—Fines Levied on Women—By Whom Payable.

Defendant's wife had burned one of her husband's huts and been fined one beast by the Chief. The brother of this woman—Plaintiff, to whom Defendant had paid dowry—paid this fine at, it was stated, Defendant's request, on promise of a refund, and Plaintiff now sued for this beast and its increase.

The Magistrate gave judgment for Defendant, holding that the dowry holder was responsible for the payment of the fine.

Plaintiff appealed.

Pres.:—In this case the Native Assessors give it as their opinion of Pondo custom that in a case such as this the proper person to

pay the woman's fine is her husband, as the woman is now his child, and as the Magistrate does not appear to have gone fully into the evidence, the record is returned to the Court below to take such further evidence as either party may wish to adduce, and to enable the Magistrate to give a decision upon the whole of the evidence, the judgment of the Court below is set aside.

The costs of this appeal are to abide the issue.

Flagstaff. 27 April, 1910. W. T. Brownlee, A.C.M.

Ngcobo vs. Msululu.

(Bizana.)

Dowry Restoration—Breach of Engagement.

The following judgment of the Appeal Court states the grounds of action in this case.

Pres.:—In this case the Plaintiff contracted an engagement to marry Elsie, the daughter of Defendant. It was arranged that the marriage should be a Christian marriage, and that dowry should also be paid, and the Plaintiff paid stock and money representing five head of cattle. He appears then to have been anxious to have the marriage performed, but the Defendant does not appear to have been willing that this should be carried out until the payment of the dowry had been completed, and the Plaintiff abducted the girl. The Defendant got her back, and after the lapse of further time the Plaintiff again abducted the girl. The Defendant was just about this time leaving for Johannesburg, where he remained at work for some considerable time, and during his absence the girl Elsie remained with Plaintiff, who states the time was two years. When Defendant returned from Johannesburg he at once took back his daughter, and refuses to deliver her to Plaintiff until more dowry cattle are paid, and stipulates that a Christian marriage should be then contracted. The Plaintiff refuses either to pay more dowry or to contract a Christian marriage; and he now claims the return of the dowry paid by him, on the ground that the agreement as regards the Christian marriage was cancelled by the action of the Defendant in allowing the girl Elsie to remain with him, and that such tacit consent amounted to a consent to marriage under Native custom;

and that thus the girl Elsie is married to Plaintiff under Native custom, and that, therefore, because Defendant has without cause taken Plaintiff's wife from him, he, Plaintiff, is entitled to recover the dowry paid by him for the girl Elsie. The Defendant denies that he ever departed from the original agreement, and denies that there has been any marriage, even according to Native custom, and he states that he is quite prepared to carry out the original contract and hand over the girl Elsie as soon as Plaintiff has completed paying dowry, and upon condition that the marriage shall be under Christian rites, and as already stated the Plaintiff refuses to comply with these conditions.

The Magistrate in the Court below, after hearing all the evidence, has come to the conclusion that the Plaintiff has not made out a good case, and has dismissed the summons, and this Court is of opinion that substantial justice has been done. The points to be decided in this case are: (1) Was there any consent on the part of Defendant to a cancellation of the first agreement? (2) Did he consent, tacitly or otherwise, to a Native marriage? (3) Was there a Native marriage? (4) If there was no marriage, who is responsible for the breach of the contract of marriage? (5) Was there just cause for this breach? Taking these questions in detail the following seem to be clearly established by the evidence:—

(1) There was no cancellation of the original agreement. (2) There was no consent on the part of Defendant to a Native marriage. (3) Even if there had been such consent there was no Native marriage, as the abduction of a girl does not constitute marriage, for even under Native custom there is no marriage until the girl has been formally handed over to the bridegroom, and there has been no such handing over here. (4) It is quite clear that the breach of contract has been brought about by the Plaintiff by his refusal to perform either of the stipulations of the original contract, *i.e.*, to pay dowry and marry in church. The dowry of five head is quite insufficient, and the Defendant is entitled to demand more; and even supposing, for the sake of argument, that a Native marriage had been contracted, the father of the girl would be quite within his right in impounding her under Native custom of ukuteleka, and detaining her until more dowry had been paid; so whether Plaintiff relies upon the original agreement or upon the alleged Native marriage, he must fail on

this point. (5) No cause has been proved that would justify the Plaintiff in breaking off the marriage. It is true that in the first summons there is an allegation of sterility on the part of the woman, but there has been no proof of this, and in any case the judgment does not preclude the Plaintiff from still bringing forward his claim on this ground should he be advised that he has a good ground of action. Briefly then, the Plaintiff contracted to marry Elsie, and paid dowry, and he has broken off the engagement. The principles governing cases of this nature are clearly set forth in the case of *Nojiwa* vs. *Vubu* (Henkel, p. 57), in which it is laid down that where a prospective bridegroom breaks off an intended marriage without cause, he is not entitled to recover the dowry already paid by him in respect of such proposed marriage.

The appeal is dismissed with costs.

Flagstaff. 28 April, 1910. W. T. Brownlee, A.C.M.

Sigodi vs. Manamatela.

(Bizana.)

Distribution of Property—Separate Kraals—Rights of Kraal Head.

Manamatela, eldest son of Defendant, sued Defendant for the delivery of certain stock, the property of his mother's hut, which Defendant had appropriated to other purposes. He claimed the stock on the grounds that his mother and Defendant had quarrelled, and he, Plaintiff, had taken his mother away, established a separate kraal for her and himself, and taken the stock there. He alleged that his father had afterwards appropriated this stock.

Defendant admitted a separate kraal had been established, and that he had taken the stock in question, but contended that as father he had every right to do so.

The Magistrate gave judgment for Plaintiff, and gave the following reasons:—

"In this case Defendant quarrelled with his eldest son, the Plaintiff. Plaintiff thereupon took his mother and all property belonging to her hut and built a separate kraal. Some time after this Defendant re-moved the stock now in dispute from Plaintiff's kraal, and disposed of them without his wife's consent.

This, in my opinion, was contrary to Native custom, and judgment was consequently entered for Plaintiff, being guardian to his mother's hut, with costs."

Defendant appealed.

Pres.:—In this case the property claimed is actually the property of the Defendant himself, and the question of the right of a Native to dispose of his property is settled in the cases of *Mtshotshisa* vs. *Mtshotshisa* (Henkel, p. 100), *Poni* vs. *Memani* (Henkel, p. 133), *Maqetseba* vs. *Mgwaqaza* (Henkel, p. 163), and *Xabelana* vs. *Mpongwana* (Henkel, p. 170), and the points in the case having been put to the Native Assessors, they give it as their opinion that as the Defendant has taken the property in question for the lawful purposes of his own family, and as the property is his own, the Plaintiff has no ground of action, and the Defendant was entitled to take the property in question even had the Plaintiff objected, so long as he informed the Plaintiff and his mother of the purpose for which he was taking it.

The appeal is allowed with costs, and the judgment of the Court below is altered to judgment for Defendant with costs.

Flagstaff. 28 April, 1910. W. T. Brownlee, A.C.M.

Kabingwe vs. Mahlinza.

(Bizana.)

Seduction and Pregnancy—Scale of Damages—Dressed Natives.

This was an action for five head of cattle as damages for seduction and pregnancy.

The Magistrate, in giving judgment for Plaintiff as claimed, in his reasons said:—

"In this case Defendant Kabingwe admits having had connection with Plaintiff's sister Pelley, *alias* Belina, on various occasions for about a month, and that she reported pregnancy to him. It is further clearly proved by Plaintiff and his sister that Kabingwe neglects to marry Pelley as promised. I do not consider five head of cattle excessive in this case, as Defendant Kabingwe treated the girl Pelley, who, from his own admission, appears to be a respectable girl, in a disgraceful manner, and I am of opinion that where men seduce girls by promising marriage, and do not keep their promise, the highest damages should be awarded. Both Kabingwe and Pelley are 'dressed Natives.'"

Defendant appealed.

Pres.:—This appeal is on the point of the amount of damages awarded, and this Court is not satisfied that this is a case in which special damages should be given. The fact that the parties to the case are all dressed people is not in itself sufficient ground to warrant such special damages, and this Court is of opinion that the ordinary amount of three head of cattle is sufficient.

The appeal is allowed with costs and the judgment of the Court below altered to judgment for Plaintiff for three head of cattle or £15, and costs.

Cattle if paid to be subject to the approval of the Magistrate.

NOTE:—See case of *Godongwana* vs. *Runeli.* (Henkel p. 54.)

Butterworth. 4 July, 1910. A. H. Stanford, C.M.

Ntlokwana vs. Kabane.

(Butterworth.)

Illegitimate Children—Custody—Maintenance.

Kabane sued for the recovery of a certain female child his illegitimate daughter. He alleged that he had seduced and caused the pregnancy of Defendant's daughter and paid the damages demanded. He had tendered one beast as maintenance fee for this child but Defendant refuses to deliver her and has sent her away to the Colony.

Defendant admitted payment of damages but denied that Plaintiff was entitled to the girl and pleaded moreover that the child in dispute was not in his custody being beyond the jurisdiction of the Court.

The Magistrate gave judgment for Plaintiff holding that Plaintiff having tendered maintenance, which was not denied by Defendant or stated to be insufficient, was entitled to an order declaring the child to be his.

Defendant appealed.

Pres.:—According to Native custom in a case such as this the person who claimed and received the damages for the seduction and pregnancy is the proper person to be sued for the custody of the child; the Appellant having let the child out of his custody is not released from his responsibility to the Respondent. The appeal is dismissed with costs.

Butterworth. 5 July, 1910. A. H. Stanford, C.M.

Konzapi vs. Mehlenkomo.

(Willowvale.)

Dowry—Allotment of Daughters—Pondo Custom.

Mehlenkomo sued Konzapi for seven head of cattle or £35, and in his summons stated that he was the son and heir of the late Tukani, that Defendant was his uncle, and that during his minority Defendant was the guardian of the late Tukani's family and as such received dowry for Plaintiff's sister Posiwe which had increased to seven head and these he now claimed. From the evidence it appeared that the late Tukani lived in Pondoland but was smelt out and he removed to the Transkei leaving his property in Pondoland. Tukani had married Defendant's sister and on a demand for more dowry by Defendant's father the late Tukani had indicated his youngest daughter Posiwe whose dowry, when she married, would go to the Defendant's father in payment of the additional dowry demanded for Tukani's wife. Defendant alleged that the girl in question was actually handed over to his people.

The Magistrate gave judgment for Plaintiff holding that there was no Native custom under which a girl is given outright to another person, and that accordingly the dowry received for her was the property of Plaintiff.

Defendant appealed.

Pres.:—The custom of handing over a girl in settlement of claims is very common in Pondoland where the late Tukani came from and there is no reason to doubt that Tukani did hand over the girl Posiwe in order that Yani's claim against him might be settled by the dowry to be received for the girl. The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for Defendant with Costs.

Butterworth. 5 July, 1910. A. H. Stanford, C.M.

Mfiti vs. Maxalanga.

(Willowvale.)

Noxal Actions—Injuries Caused by Oxen—Negligence—Damages.

Mfiti sued Maxalanga for damages for the loss of a horse which had been gored by one of Defendant's oxen.

From the evidence it appeared that Defendant's and Plaintiff's oxen usually grazed together and were driven home together by their herd boys. On passing Plaintiff's kraal some of Defendant's cattle broke away and entered Plaintiff's kraal and one of the oxen gored Plaintiff's horse standing therein.

The Magistrate found that the animal in question was not vicious and that there was no negligence on Defendant's part in herding the cattle and gave judgment for Defendant accordingly.

Plaintiff appealed.

Pres.:—The case having been submitted to the Native assessors they state that under such circumstances where the cattle had been grazing together and were driven up to the kraal together by the boys of both owners the fact of two of the oxen of the defendant getting away from the boys and entering the kraal where the mare was does not impose any responsibility on the owner of the ox and that by Native custom such cases are treated as accidents and compensation is not recoverable.

The Court fully concurs in this view and also with the reasons given by the Magistrate and the appeal is dismissed with costs.

Butterworth. 5 July, 1910. A. H. Stanford, C.M.

Mbikwana vs. Poswa.

(Kentani.)

Adultery—Repeated Acts—Scale of Damages.

Poswa sued Mbikwana for 10 head of cattle as damages for adultery. The Magistrate awarded six head, and gave the following reasons:—

It would appear that the Plaintiff married the woman in question some years ago. Thereafter she returned to her people and Defendant then married her paying two head of cattle as dowry. In the cases of *Mgolotile* vs. *Jeli* and *Mhlola* vs. *Magqadaza* (*Warner* pp. 16 and 47) the Appeal Court has held that a man marrying another man's wife is liable for damages for adultery. Plaintiff claimed 10 head of cattle or £50 damages on account of, firstly, his position of Headman, entitling him to higher damages than are ordinarily awarded, and secondly, by reason of Defendant's continuous adultery for three years resulting in two pregnancies. As regards

the first according to Native Law those of royal blood are entitled to higher damages, but in this case although it was shown that Plaintiff is a Headman there is nothing to show that he is of royal blood. With regard to the latter, the two pregnancies are admitted by Defendant and moreover Defendant did not at all satisfy the Court that he was acting *bona fide*. He was well aware that this woman had already been married but did not take any steps to satisfy himself that the first marriage had been dissolved and thus protect himself, so that grave negligence on his part is evident. Damages were therefore given against him for 6 head of cattle or £30, following as a precedent the case of *Mgolitile* vs. *Jeli* already quoted.

Defendant appealed.

Pres.:—The Magistrate has allowed damages at ordinary rates for two pregnancies, and it has been shown to this Court that the Respondent's wife is still living with the adulterer; the Court is not prepared to reduce the damages awarded.

The appeal is dismissed with costs.

Umtata. 18 July, 1910. W. T. Brownlee, A.C.M.

Mfazwe vs. Tetana.

(Port St. Johns.)

Dowry Restoration—Allowance for Woman's Services—Pondo Custom.

Tetana sued for the return of his wife or 7 head of cattle paid as dowry for her.

The Resident Magistrate gave judgment for Plaintiff as prayed and Defendant appealed.

Pres.:—In this case the claim is for the return of dowry, the Plaintiff's wife having deserted him after having lived with him for four years and having borne no children. The defence is a claim for the deduction of two head of cattle for the service of the woman, a claim in reconvention for three head of cattle the purchase price of a horse saddle and bridle said to have been sold to Plaintiff twelve years ago by the Defendant's father, and a tender of £9 as representing the balance of two head of cattle.

The Magistrate in the Court below has disallowed the claim for the services of the woman and the claim in reconvention and has given judgment for the full value of dowry paid.

In appeal it is argued on behalf of Defendant that one beast should have been allowed in respect of wedding outfit, but this question was not raised in the Court below nor is there any evidence that a wedding outfit was provided. The matter being put to the Pondo assessors they state that under Pondo Custom one beast is allowed for the use of the woman in addition to any cattle deducted in respect of any children born. This decision is in accordance with the decision of the Appeal Court at Flagstaff in the case of *Gxonono* vs. *Skini* (19 August, 1907).

The appeal is allowed with costs and the judgment of the Court below altered to judgment for Plaintiff for six head of cattle or £18 and costs and to enable the Defendant to again bring his claim in reconvention, which does not seem to have been very fully gone into, the judgment of the Court below will be altered to absolution from the instance as regards that claim.

Umtata. 18 July, 1910. W. T. Brownlee, A.C.M.

Njaja vs. Nomandi.

(Port St. John's.)

Adultery—Ntlonze—Catch—Proof.

Nomandi, a Headman in the district of Port St. John's, sued Defendant for 10 head of cattle or £50 as damages for adultery, alleging that the act had taken place during his absence in another district and that on his return it had been reported to him by his daughter-in-law. The woman denied adultery and Defendant argued that as no Ntlonze was taken judgment could not be entered against him.

The Magistrate gave judgment for 5 head or £25 and costs believing the evidence of adultery to be conclusive.

Defendant appealed.

Pres.:—The claim in this case is one for damages for the alleged adultery of Defendant with Plaintiff's wife Nokwenzela and the case is peculiar in this respect that (1), the injured husband has made no catch such as is customary in Native cases of this nature and (2), the woman wholly denies any intimacy with the Defendant. The first point being put to the Pondo Assessors they state that it is competent for a husband to institute an action for damages for

adultery even though he himself has not made a catch where there is conclusive proof *aliunde*. The second point has already been settled in the case of *Poselo* vs. *Mtengayi* (Umtata, 20 November, 1907), when it was laid down that in the absence of admission by the woman the most convincing proof is required and in this case there is sufficient evidence against the Defendant to justify the decision of the Court below and this Court cannot say that the Magistrate in the Court below has erred in believing that evidence.

The appeal is dismissed with costs.

Umtata. 18 July, 1910. A. H. Stanford, C.M.

Ntantiso vs. Maxatazo.

(Umtata.)

Adultery—Ntlonze—Blankets—Native Procedure.

Maxatazo sued for the usual damages for adultery.

Defendant denied the adultery and claimed in reconvention damages for Plaintiff's adultery with his (Defendant's) wife. He stated that on the day on which Plaintiff alleged that he was "caught" he went with his wife and two other women to demand his wife's blanket from Plaintiff, she having confessed to having given it to him (Plaintiff.)

The Magistrate gave judgment for Plaintiff and in his reasons said:—"This case is decided entirely upon the evidence and after a careful consideration of the whole of the evidence, the Court came to the conclusion that the evidence for the Plaintiff is to be believed, and not that of the Defendant. Plaintiff produces a blanket which he says he took from Defendant, and Defendant says that the blanket really belongs to his wife, and endeavours to make this same blanket proof of the adultery of the Plaintiff with his (Defendant's) wife. The Court is not satisfied with the evidence of the Defendant and his witnesses, more especially that concerning the Defendant's visit with his wives to the kraal of Plaintiff for the purpose of claiming the blanket."

Defendant appealed.

Pres.:—Under ordinary Native procedure the Respondent,* missing his wife's blanket and on her admission that she had given it to Appellant,* would either have awaited his opportunity of

finding his blanket in the Appellant's* possession at some gathering or he would have sent his wife accompanied by at least two men to fetch the blanket from Appellant,* and it is impossible that he would have gone personally accompanied by women only to the Appellant's kraal.* The Court can only conclude that the claim in reconvention was set up as a defence to the claim in convention. The evidence in support of the latter is strong, that of Noququ who appears to be an independent witness is unshaken and appears to be conclusive of what actually took place.

The appeal is dismissed with costs.

*For Respondent and Appellant read Appellant and Respondent. The Appeal Court evidently inverted these names.

Umtata. 18 July, 1910. W. T. Brownlee, A.C.M.

Mpeti vs. Nkumanda.

(Libode.)

Illegitimate Children—Ownership—Fines—Pondo Custom.

Mpeti sued for the delivery of a certain illegitimate child born as the result of his seduction of Defendant's daughter. He alleged that he had paid four head of the fine demanded and now tendered the fifth beast and claimed the child.

The Magistrate gave an absolution judgment and his reasons were as follows:—

"In this case the Plaintiff failed to prove that he had paid more than two cattle as a fine for the pregnancy of Nohlahla and consequently would not be entitled, on the payment of one more, to the order asked for. Jiyajiya in his statement of Pondo Custom says the fine for pregnancy of a dikazi is five head of cattle and that an additional beast would be payable for maintenance of the child before the father could obtain it. The Plaintiff in his summons and throughout the case admits he was liable to the Defendant for a fine of five head of cattle and does not in any way attempt to dispute his liability in that respect. As the Plaintiff wholly failed to prove that the fine due has been paid, the Defendant was absolved from the instance with costs."

Plaintiff appealed.

Pres. :—The principles governing cases of this nature are clearly laid down in the case of *Goxo* vs. *Fredi Njiva* (Umtata, July, 1908) and it is quite clear that where in a case such as this a fine has been paid the illegitimate child will belong to the putative father. This Court however concurs in the statement made by Jiyajiya that before any claim to such can be allowed the full fine must be paid and that this may be paid at any period. The Magistrate in the Court below is not satisfied upon the evidence that more than two head of cattle have been paid and this Court sees no reason to interfere with the judgment which allows the Plaintiff still to bring forward his claims and prove the number of cattle paid by him.

The appeal is dismissed with costs.

Umtata. 18 July, 1910. W. T. Brownlee, A.C.M.

Makaula vs. Matatu.

(Libode.)

Ukungena Custom—Guardianship of Ukungena Children—Pondo Custom.

Matatu, in his capacity as guardian of the minor Makosini, sued for certain cattle the property of the right hand house of the late Satalaza of which Makosini was said to be the heir.

The defence was that Matatu, the Plaintiff, had no status to sue.

The Magistrate gave Judgment in Plaintiff's favour and Defendant appealed.

Pres. :—In this case the Plaintiff sues as the guardian of a minor Makosini and bases his guardianship on the fact alleged by him that on the death of Satalaza, the father of Makosini, he, under the "Ukungena" custom went in unto the mother of Makosini, Masibeko, the right hand widow of the late Satalaza.

The defence to the action is twofold :—(1) Defendant denies that Plaintiff is the guardian of Makosini and states that he himself is guardian and (2) Defendant denies that the stock in question is the property of the right hand house.

The position of affairs having been placed before the Pondo Assessors, they state that according to Pondo Custom :—

(*a*) The only person to go in unto a widow under the "Ukungena" custom is some one who is of kin to her late husband.

(*b*) It does sometimes happen that a stranger takes up with a widow and that sometimes the relatives of the dead man do not drive him away and he is allowed to live with the woman, but neither such a person nor his children have any status but are dependants of the kraal of the dead man.

(*c*) Such a stranger may not exercise the office of guardian over children or property of the dead man, as he himself is a dependant.

(*d*) In a case such as this now before the Court the proper guardian is the Defendant and the proper person to sue him on behalf of the minor Makosini is Makosini's mother.

(*e*) A man who goes in unto a widow must live with her at the kraal of her late husband and if he takes her to the kraal of her own people this is an offence.

In this case it is clear that Plaintiff is not related in any way to the late Satalaza and does not in fact belong even to the same tribe, and it is therefore not competent for him to exercise the function of guardian over Satalaza's children and estate, and on these grounds the Defendant is entitled to succeed as against the Plaintiff and it is not necessary at present to go into the question of the ownership in number of cattle.

The appeal is allowed with costs and the judgment of the Court below altered to absolution from the instance with costs.

Umtata. 20 July, 1910. W. T. Brownlee, A.C.M.

Tata vs. Ntlukaniso.

(Libode.)

Seduction—Paternity—Deposit of Beast Pending Birth of Child—Pondo Custom.

This was an action by Ntlukaniso for five head of cattle as damages for seduction and pregnancy.

Defendant admitted intimacy but denied paternity of the child and alleged that he had tendered a beast according to custom in order that the case might be held over until the child was born.

The Magistrate gave judgment for Plaintiff and Defendant appealed.

Pres.:—The appeal in this case is on a point of custom, the Appellant stating that in the Court below he desired the case to be

held over pending the birth of the child of which Defendant is alleged to be the father, and that the tender of a beast was made with this object in view. The matter being put to the Pondo assessors (Mangala, Maxaka, Vila and Nomandi) they state that the following is Pondo custom:—

Where a girl has been seduced and got with child and the alleged seducer admits intimacy but denies paternity and alleges that other men had also been intimate with the girl, the custom is that the Court should call upon the Defendant to deposit a beast which is held by the girl's father pending the birth of the child and the case is then decided after it has been decided whom the child resembles. And in such cases the other men who were said to have been intimate with the girl are called in after the birth of the child. This course is followed even though such men deny intimacy.

The Defendant having made the tender above alluded to, this Court is of opinion that the Court below should have allowed the case to stand over pending the birth of the child.

The appeal is allowed and the judgment of the Court below set aside and the case remitted to the Court below to be decided in accordance with the custom above described.

Costs of this appeal to be costs in the cause.

Umtata. 21 July, 1910. W. T. Brownlee, A.C.M.

Hlangu vs. Mkutshwa.

(Ngqeleni.)

Noxal Actions—Injuries Caused by a Cow—Negligence—Pondo Custom.

The Judgment of the Appeal Court in this case states the grounds of action.

Pres.:—In this case the Plaintiff sues for damages by reason of a certain mare of his having been gored by a cow, the property of Defendant, the animals being both at the time on the common pasture lands of the Native Location in which the parties reside and the mare having died from the effects of the injuries received; and the judgment of the Court below is for the Plaintiff for £12 and

costs; and this Court is of opinion that this judgment cannot stand.

It is true that in the case of *Hall* vs. *Mosea* (23 Juta 746), the CHIEF JUSTICE said, "A full grown bull is ordinarily an animal with vicious propensities, and if the owner allows it to wander abroad and injure the cattle of others on a public road there is such a degree of *culpa* as to render him liable for damages," and that in the case of *Zigebi* vs. *Jack* (N.A.C. 172), this Court held that by analogy the same rule should apply in the case of a stallion; but in the case of *Parker* vs. *Reid* (21 Juta 496), in which one of the two horses standing outside a farrier's shop kicked the other and caused such injuries as necessitated the shooting of the injured horse and in which the Magistrate held that because there was no evidence of negligence on the part of the servant who was leading the horse nor was there any evidence that the Defendant's horse had formerly been known to injure any other person or horse the Defendant was not liable and dismissed the claim, the CHIEF JUSTICE remarked:—

"In the present case the Court has to decide the liability or otherwise of the owner of a horse for a sudden act of a violent nature contrary to its usual habits. It is the case of mischief done by the vice of an animal, such vice having been causelessly stirred within it and not excited by provocation from without. If the horse had been known to the owner to have the vicious propensities of kicking he would be liable, not on account of his ownership but on the ground that with such knowledge he did not guard against the possibility of its doing mischief; the question is whether without such knowledge the owner should be held liable. . . . .

"In the absence of any evidence of *culpa* on the Defendant's part I am of opinion that the Magistrate gave a proper judgment and the appeal must be dismissed with costs."

The questions at issue here have been put to the Native Assessors and they state that under Pondo Custom damages are paid for injuries done by bulls, but that from time immemorial no damages are paid for injuries caused by cows on the common pasture lands, not even in the case of a second injury. The Pondo custom would therefore seem to be very similar in its effect to the law as laid down in the case of *Parker* vs. *Reid*.

The appeal is allowed with costs and the judgment of the Court below altered to judgment for Defendant with costs.

Umtata. 21 July, 1910. W. T. Brownlee, A.C.M.

Ndabeni vs. Mangunza.

(Mqanduli.)

Adultery Committed during Period of Teleka—Damages—Liability.

Mangunza sued Ndabeni for five head of cattle being damages for adultery. He alleged that his wife was the daughter of Defendant to whom he paid dowry. After marriage Defendant teleka'd his daughter for more dowry and the additional dowry demanded was duly paid out. During the period of detention the wife committed adultery with some person unknown to Plaintiff and both the wife and Defendant refused to disclose the name of the adulterer. On these grounds he claimed that Defendant was responsible for payment of the damages.

The Magistrate awarded the five head claimed and Defendant appealed.

Pres.:—The various points in this case being put to the Native Assessors (Koyi, Mbasa, Xatinga, Matanzima and Ngela) they state that under Native Custom:—

1. If when a woman has been impounded by her father she, while so impounded, commit adultery and is got with child, and she and her father refuse to disclose the name of the adulterer, the injured husband may when he has released the woman demand the damages usually paid for adultery and pregnancy from the father of the woman.

2. That such refusal to disclose the adulterer is in itself a rejection of the husband and he is therefore entitled to demand the return of his dowry.

The appeal is dismissed with costs.

Umtata. 21 July, 1910. W. T. Brownlee, A.C.M.

Ntsunguzana vs. Ngada.

(Ngqeleni.)

Dowry—Payment on Behalf of Another—Refund from Daughter's Dowry—Pondo Custom.

Ntsunguzana sued Ngada for the delivery of seven head of cattle.

The Magistrate in giving judgment for Defendant said:—

Plaintiff alleges that his father Ncinca paid dowry on behalf of Defendant's father Maram when the latter married Mahlongwana and that therefore he is entitled to the whole dowry of the only surviving daughter of the marriage to the prejudice of Maram's four sons. In effect he claims that Maram's sons are not entitled to any of their sister's dowry for the reason that he has a prior claim.

It is common cause that there were only two daughters of the marriage with Mahlongwana and that the dowry of the eldest was returned to her husband after her death.

The only surviving daughter was married according to the evidence of Plaintiff about 1877 and, according to the evidence of Defendant, not long before Annexation. The Court is inclined to accept the latter date. In any case the Plaintiff has delayed at least 16 years in bringing forward his claim. His excuse that the delay was due to his removal to the Tuleka cannot be accepted. The Tuleka is only a few hours journey from Defendant's Kraal.

There is insufficient evidence to prove that Plaintiff's father paid dowry on behalf of Defendant's father, and on this ground alone judgment is given for the Defendant.

There is another point upon which this Court would like an expression of opinion from the Native Assessors. It seems customary when one member of a family contributes dowry on behalf of another that the contributor is entitled to the whole or portion of the dowry of the first daughter. It is not clear to this Court whether in the event of no dowry being received from the first daughter he would be entitled to the second daughter, or, as in this case, the only surviving daughter of the marriage.

Plaintiff appealed.

Pres.:—The points in this case having been submitted to the Native Assessors (Mangala, Maxaka, Vila, Nomandi and Jiyajiya), they state that under Pondo custom (*a*) If A marry a wife for B on the understanding that he is to receive the dowry of the eldest daughter of such wife and the eldest daughter die, then A will look to the other daughter of the woman for the return of his cattle. (*b*) If A take only one beast out of the first girl's dowry, and is satisfied, that extinguishes his claim.

This Court sees no reason to interfere with the judgment of the Court below. The Magistrate is not satisfied upon the evidence that Plaintiff's father did pay dowry on behalf of Defendant's father

and this Court is of opinion that had the late Ncinca had any claim on the dowry of the girl Nomtshekete he would have brought it forward at the time, and he delayed to do so at his own risk. This Court also is unable to understand the Plaintiff's delay in bringing forward the present action for it would appear that the girl Nogungqa was married at least thirteen years ago.

The appeal is dismissed with costs.

Umtata. 22 July, 1910. W. T. Brownlee, A.C.M.

Rwamza vs. Nkankane.

(Engcobo.)

Dissolution of Marriage—Ill-Treatment—Deductions.

Rwamza sued for the restoration of his wife or eight head of cattle the dowry paid for her.

Defendant put in a special plea that Plaintiff on account of his continued ill-treatment and neglect of his wife had forfeited his claim to the return of dowry, but to mark dissolution of marriage he (Defendant) tendered one beast.

The Magistrate gave judgment for the one beast tendered and Plaintiff appealed.

Pres.:—In this case it seems to be clear that the Plaintiff's wife has left him on account of his persistent ill-treatment of her and the decision of the Court below is quite in accordance with the ruling on the case of *Keli* vs. *Ketli* (N.A.C. p. 171) where it was laid down that when a husband by ill-treatment drives away his wife for no reasonable cause it is under Native Custom a bar to the recovery of the dowry paid or a reasonable ground for a portion of it being withheld.

The Appeal is dismissed with costs.

Umtata. 23 July, 1910. W. T. Brownlee, A.C.M.

Magi vs. Sibizwe.

(Engcobo.)

Dowry Restoration—Valuation—Ukuteleka Custom—Sufficient Dowry—Mpotulo Beast—Use of Woman—Deductions from Dowry.

Sibizwe sued Magi for the return of his wife or in the alternative eight head of cattle or £60 the dowry paid for her.

Defended admitted receipt of seven head of cattle as dowry but pleaded he had teleka'd the woman in question. Defendant further admitted that an eighth beast was paid but stated this was to replace the Mpotulo beast killed. Defendant further declined to release Plaintiff's wife unless two cattle and a horse were paid. No children were born of the marriage and the woman was supplied with a wedding outfit.

The Magistrate gave judgment for the return to Plaintiff of his wife failing which payment of eight head of cattle or £60 less £3 for wedding outfit and he furnished the following reasons:—

"Plaintiff claimed return of wife or dowry—eight head. Defendant admits receipt of eight head but states he had teleka'd Plaintiff's wife and demanded two cattle and a horse as telekwa fee. In reply to Court, Plaintiff declined to pay more. Court considered eight head a fair dowry and as Plaintiff refused to pay more ordered the return of wife or refund of dowry less £3 for wedding outfit. There were no children."

Defendant appealed and the Appeal Court (8 November, 1909), returned the case for further evidence with regard to the reasons for which the wife was teleka'd and whether at the marriage any number of cattle were agreed on.

Further evidence was taken and on the 17th March, 1910, the Appeal Court made the following order:—

"It is unfortunate that in returning this case for further evidence the Magistrate's decision on the partly heard case was not set aside to enable him to give a judgment on the whole of the evidence. This will now be done. The judgment given by the Magistrate on the 12th October, 1909, is set aside and the case returned to him to give a fresh judgment on the whole of the evidence recorded by him, costs to abide the result, after giving due consideration to the point whether or not there was agreement as to the number of cattle to be paid."

The Magistrate then gave judgment similar in terms to his first judgment and furnished reasons as follows:—

"This Court does not believe the evidence as to an agreement having been made regarding the amount of dowry to be paid. Defendant may have had in his mind a certain number of cattle which he hoped to get for his daughter but there is nothing to show that Plaintiff agreed to pay any number. Court considers eight head of cattle a fair dowry and found accordingly."

Defendant again appealed.

Pres.:—In this case the appeal is on the following points:—

1. That the Magistrate in the Court below has not exercised a proper discretion in deciding that eight head of cattle are a sufficient dowry.

2. That the valuation of £7 10s. 0d. is an excessive value to place upon cattle.

3. That the Magistrate has made no allowance, in computing deductions, for the Mpotulo beast killed by the Defendant and for the use of the woman and has allowed only £3 for wedding outfit whereas he should have allowed one beast.

The point of valuation has been decided in the case of *Mapongo* vs. *Zuma* (N.A.C. p. 207) where the Court ruled that as the Defendant has two other alternatives besides paying money, first of restoring the woman and, second, of paying cattle, it would not vary the judgment of the Court below; and the point of allowance for the use of the woman was decided in the case of *Humana* vs. *Kakaza* (N.A.C. p. 183) in which the Native Assessors stated that no beast is deducted for the use of the woman where no children have been born.

The remaining points having been submitted to the Native Assessors, they state that under Tembu custom in former days when cattle were plentiful eight head of cattle was not a sufficient dowry, and fathers demanded ten and fifteen and even more cattle according to their rank and the means of the suitor, but that now, owing to the scarcity of cattle by reason of rinderpest and other disease, people are content with eight head, though at the same time, as cattle are once more increasing in number, the tendency is to demand larger numbers. That in computing dowry to be returned on the dissolution of a marriage, no beast is deducted on account of the Mpotulo beast, which is a beast taken by the wedding party from the home of the bride (duli) to the kraal of the bridegroom and slain there, as it is regarded as a part of the wedding feast. And that a beast is deducted in respect of wedding outfit.

This Court is of opinion that the Court below in the absence of any specified agreement as to number of cattle to be paid has not improperly exercised its discretion in deciding that eight head of cattle is a sufficient dowry, and that in view of the decisions above referred to and of the opinion of the Native Assessors, there is no ground—though the value fixed does seem high—to disturb the

decision on the point of valuation of cattle and that the Court below has rightly refused to allow any deduction for the use of the woman and in respect of the Mzotulo beast.

On the point of the sum of £3 allowed for the wedding outfit, this Court is of opinion that as it is usual to allow a deduction of one beast in respect of wedding outfit a beast or its value should have been allowed in this instance and that as the value of the cattle to be repaid is placed at £7 10s. 0d. the value of the beast to be deducted should have been placed at the same figure, but as this point does not seem to have been raised in the Court below, this Court does not see sufficient ground for allowing the appeal upon it, and in all probability the custom of allowing £3 for wedding outfit in the district of Engcobo is probably due to the fact that the value of pre-rinderpest cattle was placed at £3.

The appeal is dismissed with costs but in dismissing the appeal, this Court will amend the judgment of the Court below by allowing one beast or its value £7 10s. 0d. for wedding outfit and thus giving judgment for Plaintiff for the return of his wife or six head of cattle or value £52 10s. 0d.

Umtata. 23 July, 1910. W. T. Brownlee, A.C.M.

Dalisiko vs. Notyanga.

(Elliotdale.)

Procedure—Irregularity—Adultery—Ntlonze—Essentials of Catch.

Notyanga instituted an action for adultery damages and succeeded in obtaining judgment and Defendant appealed.

The judgment of the Appeal Court discloses the grounds of appeal.

Pres.:—In this case the appeal is first upon the point of an irregularity, and, second, upon the general merits of the case.

The irregularity upon which the Defendant relies lies in the fact that the Magistrate in the Court below appears to have been very largely guided to his decision by information which was laid before him outside the proceedings in this case, and judging by the fact that when the Defendant closed his case the Court adjourned the proceedings for further evidence and from the fact that pointed reference is made by the Magistrate in his reasons to a statement

made to him by one Liwani and which does not appear upon the record, it would seem that in giving his judgment the Magistrate has allowed himself to be influenced by the statements of Liwani and this is an irregularity such as would entitle the Defendant to succeed in his appeal.

While this Court does not consider itself under the foregoing circumstances bound to give any finding on the general merits of the case, yet it feels bound to say that the Plaintiff's case seems to be a very weak one. The usual course in these cases is that the husband should make a "catch"—and this may be done in various ways—and that then he should produce evidence of improper intimacy. In this case there has been no catch or material token produced in Court, and the Plaintiff bases his action on the discovery of certain two handkerchiefs found in the possession of his wife and upon the evidence of certain persons who testify to improper relations between Defendant and Plaintiff's wife, and the matter having been put to the Native Assessors (Koyi and Mbasa) they state that under Tembu custom the finding of a handkerchief or some similar article of attire which cannot be identified does not constitute a catch.

The appeal is allowed with costs on the ground of irregularity and the judgment of the Court below set aside and the case remitted to the Court below for trial *de novo*.

Umtata. 25 July, 1910. W. T. Brownlee, A.C.M.

Jelani vs. Mrauli.

(Cofimvaba.)

Ubulungu Cattle—Progeny—Restoration—Miscarriages—Deductions.

Jelani sued Mrauli for the restoration of his wife or six head of cattle, the dowry paid for her.

Defendant admitted payment of dowry but claimed to deduct one animal for a wedding outfit and four for the four children born of the marriage. He counter-claimed for five head of cattle being an Ubulungu beast given to Plaintiff's wife and its progeny and tendered two head of cattle upon the cattle claimed in reconvention being handed over to him. In evidence it appeared that one child

was born of the marriage and that there had also been two miscarriages—on one occasion of twins—which occurred when Plaintiff's wife had been three months pregnant.

The Magistrate gave judgment for Plaintiff for the return of his wife or three head of cattle, allowing a deduction of one beast for the wedding outfit, one for the child born of the marriage and one as "consolation" for the miscarriages. No order was made as regards the return of the Ubulungu beast it having died, and the progeny not being returnable.

Plaintiff appealed and Defendant cross appealed.

Pres.:—In this case the claim in the Court below is for the restoration of Plaintiff's wife or alternatively for the return of the dowry paid for her which is admitted to be six head of cattle. The defence is that four children have been born, and an outfit provided, and a tender after deduction on account of the above of two head of cattle, and a claim in reconvention for five head of cattle, being an Ubulungu beast handed to the woman by the Defendant and its progeny. In reply to the defence set up, the Plaintiff admits the birth of one child and two miscarriages, admits also the receipt of the Ubulungu beast and its progeny, but states that this beast and its progeny are dead, and that the tender of two head of cattle was a qualified one, being made subject to payment of the five Ubulungu cattle.

The judgment of the Court below is for Plaintiff for the return of his wife or three head of cattle, allowing the Defendant the deduction of one beast for the child born, one beast for the miscarriages, and one beast for the wedding outfit; and has made no allowance for the Ubulungu beast or its progeny.

This Court is of opinion that the Magistrate in the Court below has erred in his decision.

The tender made was a qualified one, and such a tender as the Defendant was not, under the circumstances, entitled to make, as it was contingent upon the payment to him of five head of cattle, to four of which he had no claim, and amounted in effect to a total extinguishing of Plaintiff's claim. On the other hand, although the Defendant is not entitled to recover any of the progeny of an Ubulungu beast, he is entitled to the recovery of the beast itself or its equivalent in the case of its death.

The appeal is allowed with costs, and the cross appeal allowed with costs, and the judgment of the Court below altered to judg

ment for the Plaintiff for three head of cattle and costs, and for Plaintiff in reconvention for one beast, in effect, for Plaintiff in convention for two head of cattle or £10 and costs.

The attention of the Court below is directed to the case of *Notatsala* vs. *Zenani* (N.A.C., p. 209), in which the subject of miscarriages was exhaustively gone into.

The Native Assessors being asked their opinion on this case, state that under Tembu custom no deduction is made for a miscarriage in the third month.

Umtata. 26 July, 1910. W. T. Brownlee, A.C.M.

Pangalele vs. Mtshangala.

(Engcobo.)

Ubulunga—Temporary Ubulunga Beast.

Pangalele sued Defendant for four head of cattle.

He alleged that he gave his sister—Defendant's wife—a beast as a temporary Ubulunga beast, on the understanding that the ubulunga beast was to be supplied from one of the progeny of this temporary beast, that this animal had now progeny of four, and leaving one of these as permanent Ubulunga, he sued for the return of the original animal and three increase.

On the merits of the case the Magistrate gave judgment for Defendant, and Plaintiff appealed.

Pres.:—The custom of placing a provisional Ubulunga beast and of later on giving a Ubulunga beast out of its progency is a well recognised one. In this case the decision is upon the evidence, and in the opinion of this Court there are three very strong points in the favour of the Defendant. The first is that the Plaintiff in bringing his case alleged that the cattle which he now claims were left with the Defendant for milking purposes, whereas his witness, Menziwe, who is said to have left them, says he left them because there was a dispute about a horse; and the second is the fact that when Menziwe gave the final Ubulunga beast he did not take off the balance with him; and third, that Plaintiff has let this case lie for eight years before bringing it on.

The appeal is dismissed with costs.

Umtata. 26 July, 1910. W. T. Brownlee, A.C.M.

Qongqi vs. Kambati.

(Elliotdale.)

Dowry Restoration—Acceptance of Instalments—Deductions.

Kambati sued for ten head of cattle or £30, being balance of dowry due to him on the dissolution of his marriage. In 1905 Plaintiff had got judgment for the return of his wife or her dowry, eleven head of cattle. Since then Plaintiff alleged he had only received one beast in repayment, and this only as an instalment.

Defendant contended that the first judgment had been complied with by the restoration of the wife, but that four years afterwards Plaintiff drove her away, and the marriage was cancelled by the payment of two head, which were accepted. One child had been born of the marriage since the date of the first judgment.

The Magistrate gave judgment for Plaintiff for nine head of cattle or £27, and Defendant appealed.

Pres.:—In this case the appeal is upon the following points: First, that by the receipt of two head of cattle on account of return of dowry, the Plaintiff has extinguished all further claim to return of dowry, and in support of this point the case of *Humana* vs. *Xakaza* (N.A.C., p. 183) is quoted; and, second, that no allowance has been made to the Defendant in computing deductions for wedding outfit or for the child born after the hearing of the first case and before the present case.

This Court is of opinion that the receipt of the two cattle by Plaintiff will be no bar to his claiming the balance of dowry, as the two head must be regarded as having been paid under the judgment of the Court of 1905, and as having been accepted merely as an instalment. This Court is of opinion that Defendant is entitled to succeed on the remaining point. No allowance has been made for wedding outfit, and no allowance has been made for a child born during the subsistence of the marriage between the Plaintiff and the woman Dlalibomba since the hearing of the first case, and the Defendant is entitled to both these deductions.

The appeal is allowed with costs, and the judgment of the Court below altered to judgment for Plaintiff with costs, the woman Dlalibomba to return to him within one month from date and live

and cohabit with him as his wife, or failing this, for the return to the Plaintiff of seven head of cattle or value £21.

Umtata. 26 July, 1910. W. T. Brownlee, A.C.M.

Tyaluganga vs. Calubela.

(Elliotdale.)

Practice—Provisional Judgment Re-opening.

In this case the Magistrate refused an application by Tyaluganga for the re-opening of a provisional judgment, on the ground that the Applicant had no reasonable excuse for not appearing at the proper time.

The applicant alleged that he arrived at the Court house after the judgment in the case had been given, that he had a good defence, and that he was prevented from being in time owing to the state of the weather. It appeared, however, that he lived 15 miles away, that it had not rained either on the day of the case nor the day before, and that he could have reached the Court without crossing any river.

The Applicant appealed.

Pres.:—This Court is of opinion that the re-opening of the provisional judgment should have been allowed in this case, as it seems to be beyond doubt that the Applicant had no intention of making default, and that he did appear at Court on the day on which the case was set down for hearing, but was late in doing so, and when he appeared his case had already been heard and decided; and in the opinion of this Court he has made out a sufficiently good case to justify his application for the re-opening applied for, and in this connection this Court would refer to the decisions in the cases of *Blayi* vs. *Hlobo* (N.A.C., p. 100) and *Ngonyama* vs. *Gxekabantu* (N.A.C., p. 159).

The appeal is allowed, and the Magistrate's decision on the application set aside. The provisional judgment is also set aside, and the case re-opened and remitted to the Court below to be heard upon its merits. As, however, the whole of the proceedings have arisen out of the carelessness of the applicant, no order will be made as to costs, but these will abide the issue of the case.

Umtata. 26 July, 1910. W. T. Brownlee, A.C.M.

Nqwili vs. Xilongile.

(Elliotdale.)

Adoption—Dowry Payment by Person for Adopted Son—Right of Adoptive Father.

The judgment in this case discloses the matter in dispute.

Pres.:—The circumstances of this case are as follows: The Plaintiff states that a man named Nofengu, the son of the late Mxamli, married Nohantile, the daughter of the Defendant, and paid ten head of cattle for her. Having no further means, he asked the Plaintiff to adopt him, which the Plaintiff did, and paid two cattle more as dowry on his behalf. Nofengu had two daughters by Nohantile and then died, and later Nohantile returned to the Defendant with her two daughters, and subsequently Defendant gave her in marriage to another man; and Plaintiff now sues defendant for the delivery to him of the two children of Nofengu, and for the return of the dowry paid for Nohantile.

The Defendant took exception to the proceedings on the ground that the Plaintiff has no right to sue, and set up the argument that the proper person to sue is one Gxalatana, the brother of the late Nofengu.

The case was proceeded with and postponed for the evidence of Gxalatana, but before he came into Court the exception was allowed and the summons dismissed with costs, and it is against this ruling that the Plaintiff has appealed.

The matter having been put to the Native Assessors (Koyi, Mbasa, Xatongo, Matanzima and Ngala), they state that under Tembu custom:

(1) Where a man has adopted another, and has paid dowry on his behalf, he has a claim on the children of his adopted son, and can maintain an action such as in the present case.

(2) If a brother of the adopted son has anything to say in the matter he may bring his action against the adoptive father.

This Court is therefore of opinion that the Plaintiff is entitled to succeed in his appeal, as he has a good ground of action, and any judgment in his favour will be no bar to any action to be brought by Gxalatana, who is in no way a party to this action.

The appeal is allowed with costs, and the ruling on the exception set aside, and the case remitted to the Court below to be tried upon its merits.

Umtata. 27 July, 1910. W. T. Brownlee, A.C.M.

Tonyela vs. Mjadu.

(Elliotdale.)

Seduction and Pregnancy—Acceptance of Part Payment.

Tonyela sued for two head of cattle, being balance of damages due for seduction and pregnancy of his daughter, Defendant having paid three head on account.

Defendant excepted to the summons that plaintiff is only entitled to three head and having received these three head he is debarred from claiming more. Plaintiff, in reply, stated that Defendant had paid three head, but had also nominated two more cattle, but these two nominated cattle had not been paid, and it was for these he sued.

The Magistrate dismissed the claim, basing his decision on the case of *Mkohlakali* vs. *Mashini* (Umtata A.C., 18th March, 1910).

Plaintiff appealed.

Pres.:—In this case there is an allegation that there was a distinct undertaking that the Defendant would pay five head of cattle, and the Plaintiff is entitled to prove this allegation. In the case referred to the judgment was given after the case had been fully gone into, while in this case the judgment is upon a so-called exception unsupported by any evidence.

The issues involved in this case having been put to the Native Assessors (Koyi, Mbasa, Xotongo, Matanzima and Ngala), they state that five head is the amount paid for the pregnancy of the daughter of a commoner, and that in cases where an injured parent has driven off less than the amount he is entitled to claim he must be regarded as having accepted payment in full, unless he can show that he accepted less because the seducer had not sufficient cattle to pay the full amount claimed. In such case part might be accepted as an instalment. If the seducer has sufficient cattle to pay the full amount of damages, then the cattle driven off by the injured party will be regarded as settlement in full. It is clear that Plaintiff has not yet received the full amount which he ordinarily would be entitled to claim. The appeal is allowed, and the judgment of the Court below set aside, and the case remitted to the Court below to be heard upon its merits.

Costs of this appeal to abide the issue.

Umtata. 29 July, 1910. W. T. Brownlee, A.C.M.

Ngcangula vs. Tungata.

(Qumbu.)

Trespass—Igadi or Gardens—Condition of Fencing.

Tungata sued for damages for trespass of Defendant's stock in his lands. The trespass claimed for was not denied, but the defence was that the garden trespassed upon was situated among kraals, and should therefore be properly fenced, and for this reason the Plaintiff had no claim whatever for trespass.

Plaintiff relied upon the fact that he was not claiming for trespass in enclosed land, but under the tariff for trespass in unenclosed land.

The Magistrate gave judgment for Defendant, and Plaintiff appealed.

On 23rd March, 1910, the Appeal Court remitted the case for evidence on the points (1) the situation of the garden, (2) the condition of allotment, and (3) the local custom in respect of fencing and trespass.

Pres. (29.7.10):—Further evidence having been taken on the various points raised by this Court at its last hearing of this case, the Magistrate in the Court below has found on that evidence:

(1) That the garden in question is not isolated, but adjoins other fenced gardens, and is separated from the other lands by a deep donga.

(2) That the garden was allotted to Plaintiff subject to the condition that it should be fenced, but that nothing was said about trespass of stock if it were not fenced.

(3) That the local custom is that gardens (igadi) should be fenced, but that there is conflict of evidence as to what happens where stock trespass in an insufficiently fenced garden.

And this Court sees no reason to disturb any of the above findings upon the evidence.

It is admitted that the ground in question is a garden or igadi, and it would seem, from the evidence of the Chief Constable, that the garden is properly fenced, except at the gateway. But if the gateway is insecure then the fence cannot be regarded as being sufficient, and as there was a condition that the garden should be fenced, this Court is of opinion that the owner of it is not

entitled to claim payment for trespass upon it unless it be sufficiently fenced.

Had the land trespassed upon been one of the ordinary arable lands (amasimi), such as are commonly given out to residents in Native locations, this Court would have held that the condition as to fencing would be an unreasonable one, and one that could not be enforced; but a very clear distinction must be drawn in the case of what are commonly known as "igadi," or gardens, which are themselves practically an infringement of the common pasture lands of the location, and any condition that such lands should be sufficiently fenced is, in the opinion of this Court, a reasonable and proper condition.

The appeal is dismissed with costs.

Umtata. 29 July, 1910. W. T. Brownlee, A.C.M.

Xakata vs. Kupuka.

(Qumbu.)

Ill-treatment of Wife—Dowry Restoration—Deductions.

Kupuka sued for the restoration of his wife or nine head of cattle, the dowry paid for her. In the evidence it appeared that the wife refused to return to her husband on account of his ill-treatment of her. On one occasion he had been sentenced to six months' imprisonment for assaulting the woman in question.

The Resident Magistrate decided that the ill-treatment was not sufficient to warrant a dissolution of the marriage, and gave judgment for the return of the dowry paid.

Defendant appealed.

Pres.:—In this case the Court below is not satisfied that there has been consistent cruelty on the part of the Plaintiff, but this Court is of opinion that the Court below has not given sufficient weight to the evidence of the Defendant and of the woman Maxakata. Plaintiff admits that he has committed an assault upon her, and this assault is of a very serious nature, the woman having been permanently disfigured by it. And judging by the evidence of the Defendant and the woman Maxakata, it would seem that ill-treatment on the part of the Plaintiff has been persistent, and in the opinion of this Court the Plaintiff ought not to recover the whole of the cattle paid by him.

The appeal is allowed with costs, and the judgment of the Court below altered to judgment for Plaintiff for four head of cattle or £14 and costs.

Umtata. 29 July, 1910. W. T. Brownlee, A.C.M.

Majomboyi and Another vs. Nobeqwa.

(Qumbu.)

Husband and Wife—Wife's Earnings—Exceptions—Spoliation.

Majomboyi, "assisted by Madotshi," sued Nobeqwa, for four head of cattle, and the allegations in the summons were as follows:—

That about the year 1880 the Plaintiff, Majomboyi, was seriously assaulted by the Defendant, to whom she was married by Native custom, and as a consequence she fled from his kraal and returned to her own people at Mount Ayliff.

That at that time she was pregnant with and subsequently gave birth to the Plaintiff Madotshi.

That thereafter she left Mount Ayliff and lived with the said Madotshi at Kokstad up to the present time without assistance or support from Defendant.

That whilst at Kokstad the said Majomboyi became possessed or in the possession of two head of cattle, and the said Madotshi also became possessed of two head of cattle.

That during the year 1908 the Defendant came to Kokstad and offered to be reconciled with the Plaintiffs, and to forbear from further ill-treatment, promising them a home with him. That Plaintiffs agreed to this course.

That Defendant, by reason of these promises, obtained from the Plaintiffs the said four head of cattle, saying he would drive them to his home in Qumbu and return with a wagon for the Plaintiffs and other members of their kraal in the winter following.

That after Defendant became possessed of the cattle he never attempted to carry out his promise, and has in fact disposed of the said cattle for his own use and purposes.

That Defendant obtained possession of these said cattle by fraud and misrepresentation, and has therefore committed an act of spoliation.

That he neglects and refuses to restore the said cattle, though demanded.

The following exception was filed:—

"That the Plaintiff Majomboyi has no *locus standi*, inasmuch as the summons does not disclose that the marriage between herself and Defendant has ever been dissolved; and asks that the summons as between Majomboyi and Defendant be dismissed with costs."

The Magistrate upheld the exception in so far as the first Plaintiff was concerned, and dismissed the summons with costs, and gave the following reasons:—

"Exception was taken to this summons, in so far as first Plaintiff is concerned, on the grounds that as she is Defendant's wife, and no dissolution of marriage is alleged (in the summons), she has no *locus standi* to sue. There is no dissolution of marriage in the summons moreover, a reconciliation amounting to a reunion between the first Plaintiff and Defendant is admitted. A married woman, during the subsistence of her marriage, cannot possess in herself any property whatsoever, and therefore any property she may acquire during that time belongs to her husband, and she would not be in a position to sue her husband for such property. For these reasons I have upheld the exception and dismissed the summons accordingly."

Plaintiffs appealed.

Pres.:—In the case of *Nomlota* vs. *Mbiti*, heard in this Court on the 15th March, 1910, it was decided that the earnings of the Appellant's wife were his property, and could not be disposed of except by himself or with his approval, and in the case of *Sixakwe* vs. *Nonjoli* (N.A.C., p. 11), this Court said: "It appears to the satisfaction of this Court that whatever a woman may earn after her marriage belongs to her husband, subject to the condition that he cannot divert such earnings from the house to which she belongs, or dispose of them in any way without consulting her."

Between these two cases and this one, however, there is this difference, that while in each of those cases the woman was actually living with her husband when the property was earned, in this case the woman has been living apart from her husband for thirty years, and has acquired the property in question during her absence from him; and there is also this element in this case, that if the allegations of the summons are true, the action of the

Defendant has amounted to an act of spoliation against the Plaintiff, and it seems to this Court that the Plaintiff Majomboyi is entitled at least to have her claim excussed on this ground alone. On the point of exceptions generally, it was laid down in the case of *Zali* vs. *Bala* (N.A.C., 74) that by Native form of procedure before their own Chiefs an exception is unknown, and that the case is heard on its merits, and then decided in accordance with custom, and it was then ruled that the Magistrate had rightly dismissed the exception which was brought upon a point of Native custom. In the case of *Malusi* vs. *David Dandi* (N.A.C., 169) this Court ruled that it is not competent in a case being heard under Native custom to take exception based entirely on Roman-Dutch law. And in the case of *Njoko* vs. *Gqozombana* (N.A.C., 205) this Court remarked: "This is a case in which Native custom alone can apply. In cases dealt with by Native Chiefs there are no such things as exceptions, each case being dealt with on its merits."

The Defendant's claim to the property in question may be perfectly sound under Native custom, but this Court does not consider that he is entitled to obtain possession of it by means of what, if proved, will amount to a subterfuge, and that the Plaintiff Majomboyi is entitled to be heard.

With regard to the contention raised in this Court, but not in the Court below, that the two Plaintiffs have been wrongly joined in the summons, this Court is of opinion that this is not such an irregularity as would justify the Court in refusing to entertain the case, as it was quite competent for Madotshi to have brought the whole claim in his own name, seeing that the woman is living with him and he is for the time being her guardian.

The appeal is allowed with costs, and the exception overruled, and the case remitted to the Court below to be heard upon its merits.

Kokstad. 15 August, 1910. W. T. Browulee, A.C.M.

Gungubele vs. Xolizwe.

(Matatiele.)

Dowry—Action by Son to Compel Father to Pay—Baca Custom.

In this case Xolizwe sued his son Gungubele for certain cattle alleged to have been received by him as dowry for his (Defendant's) sister.

Defendant admitted the claim, but stated that his father was bound, under the Baca custom, to provide him with cattle with which to pay dowry, and he accordingly claimed in reconvention 26 head of cattle, the dowry he had paid for his wife.

The Magistrate dismissed the claim in reconvention, and Gungubele appealed.

Pres.:—In this case the Plaintiff brings an action against his son, the Defendant, demanding account of certain dowry cattle paid to Defendant on account of Defendant's sister, and for the delivery of certain three head of cattle now in the possession of the Defendant. The Defendant gives an account of the cattle received by him, and claims the three head of cattle now in his possession, on the ground that he has now married a wife, and that the plaintiff has not contributed to the dowry for his wife. He also brings a claim in reconvention for 26 head of cattle, for which he states that he is liable to pay for his wife, and which his father, the Plaintiff, is liable under Baca custom to pay for him.

In the course of the hearing it transpired that Defendant had made use of certain of his sister's dowry cattle to pay dowry for his wife, and the Court below gave judgment for Plaintiff for the three cattle now in Defendant's possession, and in the claim in reconvention has given judgment for Defendant, and it is upon the judgment in the claim in reconvention that the appeal is now brought.

And after hearing the Native Assessors, this Court is of opinion that under Native custom a son cannot maintain an action to compel his father to pay dowry for him, and that the judgment of the Court below should stand.

The appeal is dismissed with costs.

Kokstad. 15 August, 1910. W. T. Brownlee, A.C.M.

Siqakaza vs. Mbulo.

(Mount Ayliff.)

Illegitimate Children—Rights of Inheritance—Status—Xesibe Custom.

The facts of the case are stated in the Appeal Court judgment, viz.:—

Pres.:—In this case the Plaintiff states that he is the son of the late Vimbani in his Second House, and heir to that House, and that Defendant is the son and heir of the late Vimbani in his his Great House, and that after the death of Vimbani, Plaintiff and his mother, Manonjojo, went and lived with Mcasa, the brother of the late Vimbani, and there Plaintiff's sister Nozicusa was married, and dowry was paid for her, and of this dowry one beast was loaned to Defendant; this beast has now increased to eight head, and the Plaintiff now claims these cattle.

The defence is that Plaintiff is an illegitimate child born to Manonjojo after her husband's death, and therefore cannot inherit, and Defendant sets up a claim in reconvention for the dowries of the three daughters of the woman Manonjojo, which he says are held by Plaintiff; and the Plaintiff, while admitting that he is the illegitimate child of the woman and a man named Rungqwa, states that he is nevertheless the son of Vimbani and the heir to his Second House, as he was born in that House.

After the pleadings and replies had been filed, and evidence had been gone into, parties agreed to submit the following statement of facts to the Court below, and asked for its ruling upon them before the merits of the case were gone into:—

"1. That the Defendant is the eldest son and heir of the Chief House of the late Vimbani.

"2. That the Plaintiff is the eldest son of Manonjoji ,the widow of the Second House of the late Vimbani, Plaintiff being born after the death of the late Vimbani in the Second House of the said Vimbani, in Bizana district.

"3. That the father of Plaintiff is one Rungqwa, a cousin of the late Vimbani.

"4. That no fine has ever been demanded from or paid by the said Rungqwa by reason of the pregnancy of Manonjojo.

"5. That the woman Manonjojo is still recognised as the widow of the Second House of the late Vimbani, the said marriage never having been dissolved in accordance with the Native custom.

"6. That Plaintiff has been brought up in the Second House of the late Vimbani, and upon his marriage his dowry was paid out of the cattle of the Second House—the said cattle being from the dowry paid for the daughters of the Second House.

"7. That Manonjojo has been living for about five years past in Mcubane's Location, Mount Ayliff district, under the control of Plaintiff, who has received the dowries for all his sisters.

" And whereas certain other facts are admitted in the pleadings and evidence already adduced, the parties hereto do pray that this Honourable Court will decide upon such admitted facts, pleadings and evidence whether Plaintiff is legitimate or illegitimate in accordance with Native custom, and heir or not of the Second House aforesaid, before the other issues raised in the summons and pleadings be decided, each party reserving to himself the right to call such evidence on Native custom as he shall think fit."

The Court then recorded the evidence of Chief Mbizweni on Xesibe custom, and decided that under Xesibe custom the position of Plaintiff is only that of a younger son, and dismissed his claim with costs, and it is upon this ruling that the appeal is now brought. The whole of the case has been put to the Native Assessors. They state that where a woman gives birth to an illegitimate son after her husband's death, such son cannot inherit where there are sons of the woman's husband, and that such illegitimate son is regarded as being merely a younger brother.

This Court is therefore of opinion that the ruling of the Court below should stand, and the appeal is dismissed with costs.

Kokstad. 15 August, 1910. W. T. Brownlee, A.C.M.

Garane vs. Nkomokazi.

(Mount Frere.)

Adultery—Damages—Baca Custom.

This was an appeal against a judgment for five head of cattle as damages for adultery.

Pres.:—In this case the appeal is upon the twofold ground that the evidence is unsatisfactory and that the amount of damages awarded is excessive, and on the latter ground the cases of *Qingqe* vs. *Mpikilili* (N.A.C., p. 130) and *Mondli* vs. *Buza* (N.A.C., p. 160) are referred to for the Appellant.

There seems to be abundant evidence to support the finding of the Court below, and the Appellant's clothing was produced in Court, and he made no attempt at the time to show, as he might have done, that he was forcibly deprived of it.

On the matter of the amount of damages, the two cases referred to are Pondo cases, and in the case now before the Court the

parties are Bacas among whom it is customary to pay five head of cattle in cases of this nature.

The appeal is dismissed with costs.

Kokstad. 15 August, 1910. W. T. Brownlee, A.C.M.

Mvimbi vs. Mabata.

(Mount Frere.)

Adultery—Bona fide *Marriage—Baca Custom.*

Mabata sued Mvimbi for five head of cattle as damages for adultery. The Defence was that there was a *bona fide* marriage between Defendant and the woman in question as the Plaintiff had some years before repudiated her.

The Magistrate gave judgment as prayed holding that this marriage between Plaintiff and the woman had never been dissolved.

Pres.:—In this case it is quite clear that the Defendant knew that the woman was a married woman and that her dowry had not been returned and he therefore could not contract a marriage with her.

Upon the matter being put to the Native Assessors they state that under Baca custom it is a case of adultery and that the usual damages must be paid as the seducer may recover his cattle from the woman's father.

The appeal is dismissed with costs.

The cases quoted were:—

Jakalase vs. *Nobongo* (repudiation) "Henkel 203."

Mqwashu vs. *Mesana* (Amount of damages) "Henkel 15."

Mdange vs. *Xam Stokwe* (Amount of damages) "Henkel 162."

Kokstad. 15 August, 1910. W. T. Brownlee, A.C.M.

Gonyela vs. Sinxoto.

(Mount Frere.)

Kraal Head Responsibility—Married Sons—General Custom.

Sinxoto sued Mkonywana and Gonyela for four head of cattle being balance of damages due for the seduction of Plaintiff's daughter by first Defendant one beast having been paid on account.

Gonyela was joined in the Summons as the father of first Defendant who was an inmate of his, Gonyela's, kraal and therefore responsible for his son's torts. First Defendant having died since issue of Summons second Defendant Gonyela excepted that as his son was a major and he had provided him with a wife his liability as head of the Kraal had ceased. The Magistrate overruled the exception and on the merits gave judgment for three head of cattle—(The Plaintiff was a Pondomisi and Defendant a Hlubi.)

Defendant Gonyela appealed.

Pres.:—In this case the claim is one for balance of damages for seduction and pregnancy. The Plaintiff states that his daughter Mkamagala was seduced and got with child by the first Defendant, who is the son and kraal inmate of the second Defendant, that one beast was paid as "Nqutu" and that a second beast was paid on account of damages, and he now claims the balance of four head.

The first Defendant has died since the issue of summons, and when the case came on for hearing the second Defendant took exception to the summons on the ground that as his son was of full age, and as he had also provided him with a wife he is no longer liable for his son's torts. The exception was over-ruled and the case was then heard on its merits. Judgment was given for Plaintiff for three head of cattle or their value £15 and costs.

The second Defendant appeals on the point of the exception and cites in support of his appeal the case of *Gunyani* vs. *Modesane*, Henkel p. 255. In this case it would appear that both the parties were Basutos, and though the terms of the judgment there of this Court would almost justify the view that its provisions are of general application, yet it might be that the Court intended that only in the case of a Basuto would a father be absolved from responsibility for son's torts where he has already provided his son with a wife. And the matter was again put to the Native Assessors who unanimously state that the principles laid down in the case above referred to are of general application, and this Court is therefore of opinion that the Defendant's exception is well founded and ought to have been allowed.

It is true that Plaintiff contends that there was an undertaking in the part of the second Defendant to pay damages for his son and that this undertaking would still be binding upon him, but this Court is not satisfied that there was any such undertaking.

The appeal is allowed with costs and the judgment of the Court below set aside and the exception allowed with costs.

Kokstad. 16 August, 1910. W. T. Brownlee, A.C.M.

Mahlangeni vs. Somfuyana.

(Mount Ayliff.)

Adultery—Repeated Acts—Scale of Damages.

This was a claim by Mahlangeni for five head of cattle as damages for adultery. In awarding two head the Magistrate gave the following reasons:—

"Some time ago Plaintiff obtained a judgment against Defendant for three head of cattle for another act of adultery. The adultery was not denied by Defendant who maintained that he was not liable to Plaintiff because the woman lived at her father's or guardian's kraal. The Court held that he was and awarded two head of cattle or their value £10 to Plaintiff holding that there was a certain amount of blame attached to Plaintiff by leaving his wife with her people for so long a time without taking more active steps to get her back to his kraal."

Plaintiff appealed.

Pres.:—This Court is of opinion that the amount of damages awarded is not sufficient. The Defendant Somfuyana has committed repeated acts of adultery with Plaintiff's wife and has persisted in taking her to his brother Mrungwa's kraal even though Mrungwa has repeatedly protested against his doing so.

The appeal is allowed with costs and the judgment of the Court below is altered to judgment for Plaintiff for five head of cattle or their value £25 as against Somfuyana and costs.

Kokstad. 16 August, 1910. W. T. Brownlee, A.C.M.

Jessie Ntulini vs. Mpongo.

(Matatiele.)

Marriage Outfits—Ditsoa Custom—Basuto Customs.

Plaintiff Jessie Ntulini sued her guardian Mpongo—who had received the dowry paid for her—for the sum of £20 being the value of her marriage outfit to which she alleged she was entitled under Native custom.

The Magistrate dismissed the Summons on the ground that under Native custom a marriage outfit could not be sued for.

Plaintiff appealed.

Pres.:—In this case the Plaintiff Jessie Ntulini claims from the Defendant who she alleges has been adjudged to be her guardian a wedding outfit which she states he is in accordance with Native custom under an obligation to provide her with and which she says he has on various occasions promised to provide for her, and she further alleges that she has contracted a Christian marriage with her husband Ndongo Ntulini and that Defendant has already received dowry on account of this marriage. The Defendant raised the following exceptions:—

1. That the Plaintiff being a married woman, and whose marriage was celebrated according to Christian rites and in community of property, the action should be in the name of her husband Ndongo Ntulini, she having no *legitima persona standi in judicio*. Should this be overruled,

2. That the summons is vague and embarrassing and bad in law inasmuch as it does not specify what the marriage outfit consists of and Defendant is therefore prejudiced in his defence. Should this be overruled,

3. That it discloses no ground of action inasmuch as he (Defendant) is not legally obliged to provide or supply the Plaintiff with what the summons styles as a "marriage outfit," such obligation if any obligation exists at all being a moral and not a legal one and therefore not actionable. Should this be overruled,

4. That as such an action as this is based upon Native custom entirely and upon a marriage under Native custom, that such custom does not apply in this case inasmuch as the marriage took place under Christian rites, and that therefore there is no right of action in this case.

But later he withdrew exception No. 1 and the Court below upheld the remaining exceptions and dismissed the Summons with costs. The Plaintiff has appealed against this ruling.

The various points at issue in this case having been put to the Native Assessors they have made the following statement of Native custom:—"It is not competent for a daughter to maintain an action against her father to compel him to provide her with a wedding outfit and in point of fact many marriages are consummated without any outfit having been provided as native custom quite sufficiently provides a means by which a woman may obtain an outfit should it not have been provided on the occasion of her being handed over to her husband.

"(*a*) Under Sesuto custom the woman's father has a right under the custom of Ditsoa to a portion of the dowry paid for the woman's daughters and should she desire to be furnished with a wedding outfit, she may advise her husband not to deliver any of the Ditsoa cattle till her father shall have provided the outfit.

"(*b*) Under custom among others than Basuto the woman may approach her father with a request for a wedding outfit but may not proceed against him by way of action and should he not furnish the outfit she may advise her husband not to pay further dowry for her, upon demand, or may decline to be impounded under the Ukuteleka custom until the outfit has been provided. The foregoing would hold good even had there been an undertaking to provide outfit."

The present action is laid entirely under Native custom but Plaintiff has very unfortunately for herself complicated matters by contracting a legal Christian marriage and so has precluded the possibility of the Ukuteleka custom being put into effect by the Defendant and it would seem that the Defendant was in no way responsible for the form of marriage contracted by the Plaintiff.

This Court is therefore of opinion that the Plaintiff has no ground of action and that the third exception is well founded and was rightly upheld. The appeal is dismissed with costs.

Flagstaff. 22 August, 1910. W. T. Brownlee, A.C.M.

Mahambehlala vs. Mlonyeni.

(Lusikisiki.)

Illegitimate Children — Inheritance — Widows — Ownership of Children Born to Widow—Pondo Customs.

Mlonyeni sued Mahambehlala for six head of cattle being the dowry of a girl named Nomagqweta wrongfully received by Defendant.

The allegations in Plaintiff's Summons were as follows:—

"That he is the son and heir of Nogqala who married according to Native law and custom Magqwara daughter of Ngeleza and who paid eight head of cattle as dowry for her.

"That subsequently to her husband's death Magqwara returned to her people's kraal accompanied by Plaintiff.

"That when Magqwara was at her people's kraal she eloped with one Gebuza by whom she had two illegitmate children, namely Tsheqani and Nomagweta who were brought up at Magqwara's people's kraal.

"That about five years ago Nomagweta eloped with and married one Noranga during Plaintiff's absence in Johannesburg.

"That the Defendant who is a nephew of Gebuza some time after the marriage went to the said Noranga and wrongfully demanded the dowry for the said Nomagweta and was paid six head of cattle.

"That Plaintiff is entitled to these cattle, but that Defendant neglects and refuses to give them up to him though frequently called upon so to do. Wherefore Plaintiff prays for judgment:—

"1. That Defendant shall pay him six head of cattle, or their value £48.

"2. That Plaintiff be declared entitled to any further dowry paid or to be paid for the said Nomagweta."

Defendant pleaded that Plaintiff was illegitimate and not entitled to the girl in question.

The Magistrate gave judgment for Plaintiff as prayed and in the course of his reasons said: "The Court found (1) that there was a marriage between Nogqala and Magqwara and that Plaintiff is the heir of that marriage, (2) that on Magqwara's return to her home she bore two illegitimate children, (3) that no payment was made by Gebuza in respect of the second child—the girl in question.

"The Court found for Plaintiff because it is evident Bokile lays no claim to the girl owing to the fact that Magqwara having returned to her home with her late husband's stock retained the status of a "wife" and did not revert to "girlhood." Bokile has supported Plaintiff against his own interests notwithstanding that under Pondo custom he would have had first claim on his sister's illegitimate children."

Defendant appealed.

Pres.:—In this case the first defence is that the Plaintiff is the illegitimate son of the late Nogqala and that he therefore cannot succeed to the property in the estate of Nogqala; this defence was however practically abandoned during the hearing of the case and the defence was then set up that after the death of Nogqala, Gebuza, the uncle of Defendant, married the woman Magqwara and paid dowry for her and that the girl Nomagqweta is one of the children

of this marriage and Defendant claims her on the above ground Bokili the brother of Magqwara however denies that Gebuza married Magqwara and states that on the death of Nogqala the woman having no one to look after her came with her husband's property and child to his kraal and lived there and to all intents and purposes kept Nogqala's kraal standing and maintained her status as his widow.

This case therefore is not on all fours with the case of *Goxo* vs. *Fredi Njiva* where a statement of Pondo custom with regard to illegitimate children was made by the Western Pondo Assessors, for in the latter case the statement made was with regard to children born to a widow who had left her husband's kraal and returned to her people. While in the case now before the Court it seems to be clear that the woman had no intention of abandoning her late husband's kraal, but went to her brother's kraal only because none of her husband's family remained.

The matter being put to the Pondo Assessors they state that, where the widow, because of the extinction of representatives of her husband's kraal, takes her husband's property and children to her father's kraal she maintains her status as a wife and all children subsequently born there belong to her late husband's heir and should she re-marry such marriage would at once give rise to litigation.

The Court below has found on the evidence that Plaintiff is the legitimate son of Nogqala and that the woman Magqwara did not marry Gebuza and this Court is of opinion that the Magistrate is right in holding that Plaintiff is entitled to succeed in his claim.

Flagstaff. 24 August, 1910. W. T. Brownlee, A.C.M.

Mfuzana vs. Wezi.

(Bizana.)

Dowry—Return of on Death of Wife—Miscarriages—Pondo Customs

The judgment of the Appeal Court states the grounds of appeal.

Pres:—In this case the Plaintiff claims from the Defendant the dowry which he says he paid for Defendant's daughter. He alleges that he married Defendant's daughter Mabizelweni some two years

ago and paid ten head of cattle as dowry for her and that he had one child by her and that she died about a month prior to issue of summons and he now demands the return of nine of the cattle paid by him.

The Defendant admits the marriage and the payment of ten head of cattle but denies that he is liable for the return of any of the dowry paid by Plaintiff as, he says, the woman lived for four years with Plaintiff and had two children by him. The Plaintiff denies that two children were born and says there was only one, but Defendant insists that there were two, the one being a still born child in its sixth month. The Magistrate holds that there was a miscarriage and that there was also a living child and so finds upon the evidence that Plaintiff has had two children by his wife and if the Magistrate is satisfied that the woman did have a miscarriage in her sixth month of pregnancy he is right in holding that such miscarriage would count as a child. This Court then sees no reason to disagree with the Magistrate in the Court below on the point of the number of children born to Plaintiff by his late wife.

A great number of cases on the point of the liability of a father to return dowry upon the death of his daughter have been decided in this Court. In the case of *Mpakanyiswa* vs. *Ntshangase* (Tsolo) —N.A.C.R. p. 17—in which the woman had died at her father's kraal of natural causes and where she had had one child it was decided that the dowry should be divided. In the case *Ngxakumbana* vs. *Bokolo* (Baca)—N.A.C.R. p. 27—where the woman had died in child birth the dowry was divided. In the case of *Njobeni* vs. *Mzini* (Tembu)—N.A.C.R. p. 29—and where the circumstances of the case were complicated by the fact that the woman had contracted leprosy it was decided that dowry is returnable except in cases where the woman has died in child birth, and if she died of natural causes having borne no children all the dowry is returnable. In the case of *Jongumbona* vs. *Plati* (Gcaleka)— N.A.C.R. p. 39—where the woman was sickly and died shortly after marriage without having had any children the dowry was divided. In the case of *Kowe* vs. *Mbilini* (Tembu)—N.A.C.R. p. 41— when the woman died soon after marriage and had no children the dowry was halved. In the case of *Ndaba* vs. *Kutu* (W. Pondo)— N.A.C.R. p. 84—and where there was the added complication that the woman had committed suicide it was decided that if there are no children dowry is divided and if there are children no dowry is returned. In the case of *Jumba* vs. *Dubulekwele* (Fingo)—

N.A.C.R. p. 119—in which the woman died six months after marriage and had borne no children it was decided that if there were no children or only one or two children, the dowry or a portion of it is returnable. In the case of *Mampondo* vs. *Gongota* (Pondo)—N.A.C.R. p. 123—where the woman died in childbirth it was laid down that in such cases it is not etiquette to demand return of dowry, but should this be done the dowry would be divided, the larger portion being left with the woman's father.

It would seem that the custom in this matter varies considerably and that no definite ruling has been laid down as to the exact procedure to be followed and each case has apparently been dealt with to a great extent on its merits. The case however which is most nearly analogous to the case now before the Court is that of *Ndaba* vs. *Kutu* (Pondo)—N.A.C.R. p. 84,—in which it was decided that if there are no children dowry is divided and if there are children no dowry is returned.

The case in all its aspects has, under these circumstances been submitted to the Native Assessors and they give the following unanimous statement of Pondo custom.

If a woman die in childbirth either at her husband's kraal or at her father's kraal, having borne children, one beast is deducted for the child and one for wedding outfit, if any, and the balance of the dowry is divided.

If she die in childbirth either at her husband's or her father's kraal having had one or two children, dowry is not paid out. If she die of natural causes either at her husband's or her father's kraal having had no children, if such death occur shortly after marriage, the greater portion of the dowry is paid out, but if the death occurs when the woman is old and has lived many years with her husband, no dowry is returnable.

If she die of natural causes either at her husband's kraal or her father's kraal having had one or two children, no dowry is returnable.

In the case now before the Court the woman has died of natural causes and there have been two children, and applying the test of the case of *Ndaba* vs. *Kutu* and the Pondo custom as is stated in the last clause of the Assessor's opinion, this Court is of opinion that Defendant is not liable for the return of the dowry paid for his daughter, and that the judgment of the Court below is well founded and should stand.

The appeal is dismissed with costs.

Flagstaff. 24 August, 1910. W. T. Brownlee, A.C.M.

Maqela vs. Siyoyo.

(Bizana.)

Dowry Restoration—Chiefs of Rank—Actions Arising Before Annexation—Pondo Customs.

The Judgment of the Appeal Court states the grounds of appeal.

Pres.:—In this case the Plaintiff brings a claim against the Defendant, whom he describes as the son and heir of the late Chief Madikizela in his Minor Hut for the return of the dowry paid for Mangutyana the daughter of Madikizela by Mpeku "now deceased" the father of Plaintiff. Plaintiff states that his father married this woman during the lifetime of the late Chief Madikizela that the woman lived with him for three months and then left him and that she was then married to a man named Rwexe, that upon such subsequent marriage Defendant's father Madikizela returned to Plaintiff's father three head of the dowry cattle paid and Plaintiff now claims the balance of eleven head. The defence set up is that the late Chief Madikizela was a Chief in his own right being the Chief of the Mangutyana tribe and that among the Pondos it is not the custom for Chiefs to return dowry; and that in this case the ground of action arose before annexation and that therefore it is not competent for Plaintiff to raise an action now.

A great deal of evidence has been led on both sides as to custom and it would seem that a custom such as that pleaded by Defendant did exist. The only two reported cases decided in this Court are those of *Welapi* vs. *Mbango* (N.A.C.R. 2) and *Matwa* vs. *Mareke* (N.A.C.R. 277) in each of which, though the defence set up here was raised, the judgment of this Court was that the Plaintiff was entitled to recover his cattle. In each of these cases however there was this distinction from the case now before the Court that the Chief there concerned was a petty Chief while the late Madikizela was a Chief of a Tribe. In the case now before the Court there is however this element that the whole of the grounds of action arose during the life time of the late Chief Maqikela and before annexation and no reason is shown why this action was not brought then. Had it been brought before annexation it is quite clear that Plaintiff could not have succeeded in his action, and this Court is of opinion that as he could not have succeeded

then he should not succeed now as the simple fact of annexation would not confer upon him greater rights under Native law and Custom than he enjoyed before annexation under Native Law and Custom. There is this further point that Plaintiff's father, during the life time of Maqikela, received back from Defendant's father three head of the dowry cattle paid by him, and unless it can be shown that this was paid and received merely as an instalment and in part settlement, it must be held that the late Mpeku then received all that he was entitled to receive, and that this claim was then satisfied.

This Court is of opinion that the decision of the Magistrate in the Court below is right and the appeal is dismissed with costs.

Umtata. 7 November, 1910. A. H. Stanford, C.M.

Zokwana vs. Madolo.

(Port St. John's.)

Adultery—Ntlonze—Catch of Adulterer by Son—Pondo Custom.

Madolo sued Zokwana for three head of cattle as damages for adultery. In the evidence it appeared that Plaintiff had sent his son to look for his wife who was missing. The son found her lying with Defendant and took away Defendant's stick and blanket but afterwards gave them back. The Magistrate gave judgment for Plaintiff holding adultery to have been proved, and Defendant appealed.

Pres.:—The question having been put to the Native Assessors whether it is competent under Native custom for a son to "catch" an adulterer on behalf of his father, and if an action for damages lies on such a "catch," they reply that such is in accordance with Pondo custom.

In the present case the evidence, both in the criminal and civil cases, points conclusively to adultery having been committed.

The appeal is dismissed with costs.

Umtata. 7 November, 1910. A. H. Stanford, C.M.

Ntakazimnyama vs. Ngada.

(Port St. John's.)

Adultery—Wife Living With Relations—Ntlonze.

The facts of the case are contained in the Appeal Court judgment.

Pres.:—The facts in this case are as follows:—Appellant's wife Mambeje went to her own people and at their kraal gave birth to a child; she remained there some two or three years and again became pregnant. Appellant in his summons alleges that Respondent committed adultery with his wife and caused her to become pregnant. He has no personal knowledge but the woman's three brothers with whom she was living testify to Respondent's criminal intimacy with their sister. There is no reason to discredit their evidence, they have nothing to gain or lose. It is customary that when a married woman is staying with her own people they are supposed to look after her and know what she is doing. An adulterous intimacy is generally hidden from a father but the other members of the family are usually aware of what is going on. The Magistrate lays much stress on the fact that no Ntlonze or token was taken from Respondent, but such a thing is never done by the woman's relations.

In the face of the woman's statement that she is pregnant by her husband, a point on which he was not examined, it is not possible to hold that Respondent caused her pregnancy but the Court is fully satisfied that the adultery has been proved.

The appeal is allowed with costs and judgment in the Magistrate's Court entered for Plaintiff for three cattle or £15 and costs of suit.

If cattle are tendered in settlement their acceptance is to be subject to approval by the Resident Magistrate.

Umtata. 8 November, 1910. A. H. Stanford, C.M.

Ngamle vs. Fitshane.

(Qumbu.)

Dowry Payment by Father for Son—Return from Dowry of Eldest Daughter—Distribution—Deductions for Ceremonies—Pondomisi Custom.

Fitshane sued Ngamle for four head of cattle his summons reading as follows:—

(*a*) That he is the eldest brother of the Defendant.

(*b*) That before Rinderpest he paid six head of cattle as dowry, and on behalf of Defendant to Bola for Olo the Defendant's wife.

(*c*) That in consideration thereof the said number of cattle so paid by Plaintiff on behalf of Defendant were to be repaid out of the dowry of Defendant's eldest daughter in case of her being married.

(*d*) That on or about last year Nofonqela Defendant's daughter was married and eight head of cattle were paid for her as dowry.

(*e*) That Defendant has only repaid Plaintiff two head of cattle out of the dowry of Nofonqela leaving a balance of four head of cattle which number of cattle or their value the said Defendant refuses and neglects to repay although repeatedly requested so to do.

Defendant admitted having a daughter for whom he had received dowry and that Plaintiff would be entitled to the return of the six head of dowry paid on Defendant's behalf provided Plaintiff provided for the girl under Native Custom. Plaintiff in turn admitted that no Intonjane or marriage expenses were incurred by him in respect of Defendant's daughter.

The Magistrate gave judgment for three head and in his reasons said:—It is clear that Plaintiff is the elder brother of Defendant and heir to their late father's estate and the dowry paid out for Defendant was the dowry received for their sister—the eldest girl of the kraal. Defendant alleges in his admission that Plaintiff would be entitled to the six head provided he had complied with the custom of providing for Defendant's daughter. The Court held that Plaintiff was heir to their late father, that all dowry of the eldest girl belongs to him as the eldest girl is never allotted, and that according to custom Plaintiff was not bound to provide for Defendant's daughter and was therefore entitled to four of the cattle still due but allowed Defendant one as maintenance. After giving judgment I consulted two Pondomisi Headmen (the parties being Pondomise) who agreed with the judgment with the exception of the beast I allowed as maintenance. They stated that Plaintiff was not bound to provide for Defendant's daughter in any way."

Defendant appealed and Plaintiff cross-appealed.

Pres.:—The points of custom arising in this case having been submitted for opinion to the Native Assessors they state that the

elder brother as representing his father was the proper person to distribute this dowry. That it is an important point as to whether the younger brother applied for assistance or not, this the evidence does not disclose, but in the distribution the younger brother should be allowed for the usual expenses such as those of the Intonjane and wedding outfit if he incurred them.

The dowry paid was eight cattle, the Magistrate's judgment makes the number allotted to the Plaintiff in the Court below five head, the Defendant retaining three which is a reasonable number for the expenses incurred by him.

The appeal is dismissed with costs. The decision in the appeal disposes of the cross appeal which is also dismissed with costs.

Umtata. 9 November, 1910. A. H. Stanford, C.M.

Maloyi vs. Mlalandle.

(Qumbu.)

Dowry Cattle—Engagement to Marry—Enforcement of Contract.

Mlalandle in his summons said that about three years ago Defendant Maloyi became engaged to his daughter and paid as part dowry seven head of cattle, that it was agreed that the marriage should take place in accordance with Christian rites, that Plaintiff has always been willing to have the marriage solemnized but Defendant now refuses to marry the girl according to Christian rites and Plaintiff asked for an order declaring Defendant to have forfeited all rights to the dowry paid.

Defendant excepted that the agreement to marry alleged by Plaintiff was one subject to Colonial Law and that under Colonial Law no cause of action was disclosed at the suit of Plaintiff only an action for damages for breach of promise on the part of the girl.

The Magistrate dismissed the exception and Defendant appealed.

Pres.:—In this Court the only matter before it is the exception which has been taken and the Magistrate's ruling on that exception.

The action in the Magistrate's Court was obviously brought under Native custom being in connection with cattle paid as dowry of which Colonial Law does not take cognizance.

Under Native custom the exception taken cannot be upheld and the appeal must be dismissed with costs.

Umtata. 9 November, 1910. W. T. Brownlee, A.C.M.

Dlakavu vs. Billy Voko.

(Libode.)

Seduction—Scale of Damages.

Billy Voko sued Dlakavu for five head of cattle as damages for seduction and pregnancy in respect of his daughter with whom Defendant had eloped. Defendant admitted elopement but denied pregnancy and pleaded he had paid Plaintiff £6 in full settlement. In reply to the plea Plaintiff withdrew the claim for pregnancy and stated that the £6 was given him by Defendant as payment of expenses incurred by Plaintiff in searching for his daughter and not in settlement of the claim. In evidence it appeared that the girl in question was engaged to be married when Defendant, a man already married according to Christian rites—eloped with her and wandered about the country with her for some six weeks.

The Magistrate gave judgment for three head of cattle and the money already paid to count as one beast and in his reasons said Defendant acted in a heartless and aggravating manner and the usual fine of one beast was wholly insufficient.

Defendant appealed.

Pres.:—In this case there are two points to be decided, first, was the sum of £6 paid by Defendant received by the Plaintiff as full settlement, and second, is the sum of £15 allowed by the Magistrate in the Court below excessive in a case of seduction without pregnancy.

On the first point it is clear that the £6 was not accepted as full settlement as when this sum was paid the claim was for seduction and pregnancy and the latter claim was later on abandoned, and as when Plaintiff was paid the sum of £6 by Defendant No. 1 he at once went on and demanded further payment from Defendant No. 2. On the second point there is no hard and fast rule as to the amount of damages to be given for damages for seduction though it is usual where girls go astray at Intonjanes that only one beast should be paid. Where however a parent exercises care over his children and they are stolen from him and seduced the Court would not be exercising an improper discretion in allowing heavier damages than one beast, and this Court is of opinion that in this case

the Magistrate in the Court below has not under the circumstances exercised an improper discretion when he awarded three head of cattle.

The appeal is dismissed with costs.

Umtata. 10 November, 1910. W. T. Brownlee, A.C.M.

Muncu vs. Budulwana.

(Engcobo.)

Custom of Tombisa.

Muncu sued Budulwana for three head of cattle and the allegations in his summons were as follows:—

"That in or about the month of May, 1910, at his (Plaintiff's) kraal in this district, and at the special instance and request of the Defendant, and on his behalf, he 'Tombisad' one Nobetele the wife of the Defendant.

"That the said Nobetele remained for two weeks at the Plaintiff's kraal for the purposes of the said Tombisaing or Intonjane ceremony, during which time the Plaintiff slaughtered one cow, one sheep and one goat for the purposes of the said ceremony and was put to other expense in connection therewith.

"That the Defendant promised and agreed to give the Plaintiff three head of cattle for his trouble and expense in connection with the said ceremony, and Plaintiff is otherwise entitled to three head of cattle for his said services according to Native law and custom."

Defendant pleaded as follows:—

"1. Defendant denies the whole of the allegations contained in Plaintiff's summons and the conclusions of law therein set forth, because he did not agree to Nobetele being 'Tombisad' and further that Plaintiff was not the proper person to Tombisa the said Nobetele.

"2. That even if the Plaintiff had 'Tombisad' the said Nobetele and Defendant had agreed thereto and Plaintiff was the proper person to assist in the said ceremony as alleged in the

summons, he is premature in his action according to Native law and custom for the reason that no female child of the marriage between Defendant and the said Nobetele has yet been given in marriage and dowry received for such child."

Plaintiff in his evidence said that the woman in question was the daughter of his maternal uncle who did not "Tombisa" her because he had no cattle. As her children were dying she and Defendant came to Plaintiff as a relative to "Tombisa" her which he did but on agreement to pay three head of cattle. The ceremonies took place after marriage. He said he claimed from Defendant because he brought his wife to be put through the ceremonies. Defendant in his evidence denied any agreement and stated his wife deserted him and during the time of her absence from him he found Plaintiff had "Tombisad" her.

The Magistrate gave judgment for Defendant and said Plaintiff had failed to prove his alleged special agreement which is entirely opposed to Native custom.

Defendant appealed.

Pres.:—This case is brought upon an alleged contract and the Magistrate in the Court below has found on the evidence that the Plaintiff has not proved the contract and that any such contract, is in conflict with Native custom.

The various points of the case have been laid before the Native Assessors and they give the following statement of custom:—

1. It is contrary to custom for a maternal uncle to exact dowry from the husband of his niece.

2. The only person from whom Muncu would claim anything is the father of the girl if there had been any agreement between them.

3. No one may "Tombisa" a woman without the instructions of the father of the woman.

4. If the father be poor he must find someone to help him, and whom he will put into the dowry of the girl.

5. The girl may not herself find such person.

6. Should the father find some person to help him by contributing to the dowry the father will have to pay such person out of the dowry of the girl, the girl's husband will not pay.

This Court sees no reason to disturb the decision of the Court below and the appeal is dismissed with costs.

Umtata. 11 November, 1910. W. T. Brownlee, A.C.M.

Mgonongwana vs. Ndata.

(Umtata.)

Dowry Restoration—Death of Wife—Division of Dowry—Deductions—General Customs.

Plaintiff Mgonongwana in his summons stated that he married his wife, Defendant's daughter, in accordance with native custom and paid four head of cattle, two horses and ten sheep as dowry for her, that Defendant provided a marriage outfit, that shortly after marriage his wife died, and Plaintiff claimed a return of half the dowry paid less the value of the marriage outfit.

Defendant denied that the woman in question died shortly after marriage and stated that she bore one child. He further stated that the dowry paid was four head and denied liability for the return of any.

The Magistrate gave judgment for two head of cattle and his reasons were as follows:—

Plaintiff in this case claimed from Defendant the return of portion of the dowry paid by him for his wife now deceased. The marriage between Plaintiff and the deceased is admitted. On hearing the evidence, I found the following facts to be proved:—

1. That only four head of cattle were paid as dowry.
2. That the woman had one child which pre-deceased her.
3. That there was a marriage outfit.
4. That the woman died shortly after her marriage to the Plaintiff.

Having found the above facts to have been proved, it is hardly necessary for me to do more than refer to the opinion of the Native Assessors given in the case of *Njobeni* vs. *Mzini*, vide Henkel's reports, page 29, wherein the custom is clearly laid down.

Defendant appealed.

Pres.:—A great many decisions have been given on the various aspects of the question of the return of dowry in event of the death of a married woman, but in no case has any general principle been laid down, and each case seems to have been decided on its merits. This Court has therefore laid the case in all its aspects before the Native Assessors and they after lengthy and careful consideration have given the following statement of Native custom.

(1) Among all Native Races it is the custom to return dowry and the only persons who are exempt from this custom are Chiefs.

(2) There are however two cases in which dowry is not returned.

(*a*) When a man is killed in battle the dowry paid by him is not returned.

(b) When a woman dies in childbirth dowry is not returned; she has died under the spear of her husband.

(3) When a man or woman dies a natural death dowry is returnable except where a woman dies being old and a wife of long standing and in such a case no dowry is returned whether she die at her own kraal or at the kraal of her people.

(4) When a woman's dowry is returned under the above circumstances and she has borne children a beast is deducted for each child and for the Ubulunga beast if any and for the wedding outfit if any, and the remaining cattle are returned to the husband.

(5) If the woman had lived three years with her husband and then died dowry is returnable.

(6) In a case where four head of cattle had been paid as dowry and there is one child and there was a wedding outfit two cattle would be retained by the father and two would be returned to the husband.

(7) In a case such as that now before the Court two cattle should be paid out and the father of the woman should retain only two.

In view of the pre-going statement it would appear that the decision of the Court below is in accordance with Native custom and the appeal is dismissed with costs.

Umtata. 11 November, 1910. W. T. Brownlee, A.C.M.

Dlakiya vs. Dlakiya.

(Engcobo.)

Christian Marriages—Inheritance—Right of Widows.

(The grounds of Appeal are disclosed in the Appeal Court judgment.)

Pres.:—In this case the Plaintiff is the widow of the late Mshweshwe Dlakiya and Defendant is the son and heir to the late Mshweshwe Dlakiya and Plaintiff was married to Mshweshwe in Church prior to 1885 (about 1877-8) and she states that some four

years ago her husband died leaving her five head of cattle which have now increased to seven head and subsequent to her husband's death the Plaintiff came and lived at her kraal and she complains that a short while back the Plaintiff stealthily removed the seven head of cattle from her kraal and has thus committed an act of spoliation and she now claims the delivery to her of the cattle in question.

The Defendant admits removing the seven head of cattle but denies any act of spoliation and says that the cattle were in his possession and are his property by right of inheritance as he is the heir of the late Mshweshwe Dlakiya.

The Magistrate in the Court below in deciding this case has held that there having been a legal marriage between the Plaintiff and her husband she is entitled under the provisions of Ordinance 104 of 1833 to hold the estate of her late husband until an executor has been appointed, and finds upon the evidence that the Defendant has committed an act of spoliation and has ordered the restoration of the cattle to the Plaintiff. The Magistrate in the Court below, however, seemed to have overlooked the terms of the decision of the Supreme Court in the case of *Sekeleni* vs. *Sekeleni and Others*. Supreme Court 21, page 118, in which the Chief Justice laid it down that a Native desiring to claim by virtue of the 30th and 38th Sections of Proclamation 112 of 1879 (in Tembuland, Sections 30-38, Proclamation 140 of 1885 are analogous) must show that the marriage by virtue of which he acquired these rights was celebrated after the passing of the Act of 1879 (in Tembuland Act 3 of 1885 is analogous), and the Plaintiff is therefore not entitled to hold under the Ordinance referred to.

In the Supreme Court case, however, the Chief Justice laid it down that the heir is subject to certain obligations and one of these is to suitably maintain his father's widow and children, and by his action in this case the Defendant is depriving the Plaintiff of her means of subsistence.

The rights of a widow in a case such as the one now before the Court are clearly laid down in the case of *Nosentyi* vs. *Makonza*, N.A.C. 37 and the various points at issue having been placed before the Native Assessors they state that though the property in question be the inheritance of the Defendant yet he has no right to remove it from his mother's kraal—the kraal of her late husband —without consulting her.

This Court is of opinion that the Court below is right in holding that there has been an act of spoliation and under these circumstances ordering the return of the cattle removed by the Defendant, and the appeal is dismissed with costs.

Umtata. 15 November, 1910. W. T. Brownlee, A.C.M.

Jakavula vs. Melane.

(Elliotdale.)

Ubulunga—Temporary Ubulunga—Bomvana Custom.

Jakavula sued Melane for the return of a "temporary" Ubulunga beast, together with its three increase, which he had given his daughter on the occasion of her marriage with Defendant. His daughter was now dead and Defendant refused to restore these cattle. Defendant pleaded that the animal in question was given as permanent Ubulunga.

The Magistrate found that the beast was given as permanent Ubulunga and gave judgment for Defendant.

Plaintiff appealed.

(The following evidence was given by Headman Ngaba in the Magistrate's Court:—"I am a Bomvana and am one of the Gwebindlala's Chief Councillors. I know the Bomvana custom of Ubulunga and I also know the Bomvana custom of temporary Ubulunga. An Ubulunga beast is a beast given to a wife by her father, and it remains her property. In the case of a temporary Ubulunga the custom is that the first calf of the beast so given becomes the Ubulunga beast, the mother being then taken back to the kraal of the father of the woman. The custom requires that the first calf, if a heifer, should become the Ubulunga and the cow should then be removed. But if the first calf is a bull calf it is permissible to let the cow remain until it has a heifer calf, after which, it should be removed together with the first bull calf. If a beast was allowed to remain long enough to have four calves without being removed it would be regarded as an Ubulunga pure and simple. It could not, either itself or with its progeny, be afterwards claimed by the kraal of the father of the woman. The beast should be taken home as soon as the calf is allotted, but there is nothing to prevent the owner making a fresh arrangement after such allo-

cation, and leaving the cow at the husband's kraal. But then the cow ceases to be either an Ubulunga or a temporary Ubulunga. The allocation is made after the heifer calf is weaned.)

Pres. :—This case being put to the Native Assessors they state that the custom of temporary Ubulunga is a common one and when such a temporary Ubulunga beast is given its first heifer calf must be allocated, as soon as it is weaned, as the final Ubulunga.

In this case the Magistrate in the Court below has held that the animal in question was given as final Ubulunga and this Court sees no reason to interfere with this decision.

The appeal is dismissed with costs.

Umtata. 15 November, 1910. W. T. Brownlee, A.C.M.

Rulwa vs. Kiliwa.

(Elliotdale.)

Ubulunga—Temporary Ubulunga—Tembu Custom.

Rulwa claimed four head of cattle which he said were a "Temporary" Ubulunga beast. and its three increase, that he had given to his sister after her marriage with Defendant. His sister had since died and Defendant refused to return these four cattle.

After Plaintiff's evidence the Magistrate dismissed the case holding that under Native law Ubulunga and dowry could not be dissociated.

Plaintiff appealed.

On 27 July, 1910, the Appeal Court in setting aside this ruling and remitting the case to be heard on its merits said:—

"The principle of the placing of a temporary Ubulunga beast is a well known one and is frequently practised and the Native Assessors state that under Tembu custom it is quite competent for a brother to give his sister an Ubulunga beast even during the lifetime of their father. In this case it is alleged that a temporary Ubulunga beast was placed with Defendant's wife by Plaintiff and it has increased and under circumstances such as these the Plaintiff would be entitled to recover the balance of existing cattle upon his allocating the final Ubulunga beast. This Court cannot concur in the view expressed by the Court below that Ubulunga and dowry cannot be dissociated."

On further hearing the Magistrate gave judgment for Defendant with costs finding that the animal in question had not been given as temporary Ubulunga.

Plaintiff appealed.

The Appeal Court dismissed the appeal, referring to the case of *Jakavula* vs. *Melane*.

Butterworth. 21 November, 1910. A. H. Stanford, C.M.

Sangqu vs. Xatana.

(Nqamakwe.)

Dowry—Allotted Daughters—Engagements to Marry.

Sangqu sued Xatana for thirty-four head of cattle and the allegations in his summons were as follows:—

"(1) That he and Defendant are both minor sons of a Minor House of the late Nyalambisa their father, Defendant being the eldest son of that House.

"(2) That during the lifetime of the said Nyalambisa he did in accordance with Native law and custom assign to Plaintiff as his (Plaintiff's) absolute property one Yawate, the sister of Plaintiff and Defendant.

"(3) That the said Yawate was first engaged to be married to one Bapeti Mdleleni (of Emgcwe), who paid eight head of horned cattle as and for dowry for the said girl, which dowry has now increased to fifteen head of cattle.

"(4) That the said Bapeti Mdleleni deserted the said Yawate who was subsequently married to one Simanga Mqina (of Toboyi) who paid Defendant twelve head of cattle and twenty sheep as and for dowry for Yawate; which dowry has now increased to seventeen head of cattle and twenty sheep.

"(5) That the said dowry cattle and increase are the property of Plaintiff.

"(6) That the Defendant has wrongfully and unlawfully possessed himself of above-mentioned thirty-four head of cattle and sheep and unlawfully detains them."

Defendant stated that Yawate was never married to Bapeti and admitted he would be liable for the dowry paid on his account, and he also admitted the receipt of dowry from Simanga but he denied the allotment of the girl Yawate to Plaintiff.

The Magistrate found that Yawate was actually apportioned to Plaintiff Sangqu and gave judgment for Plaintiff for the amount of the dowry paid by Simanga. As regards the dowry of Bapeti he gave absolution.

Plaintiff appealed and Defendant cross-appealed.

Pres.:—In this case it is clearly established that the late Nyalambisa did allot his daughter Yawate to his second son Sangqu, the Appellant. At the time this was done the relations of one Bapeti had paid eight head of cattle as dowry for Yawate but Bapeti who was absent at the time never returned, and the intended marriage between him and Yawate was never completed. Nyalambisa in the meanwhile died and Xatana his heir gave this girl in marriage to one Simanga who paid twelve cattle and twenty sheep as dowry.

The Appellant, Sangqu, in the Magistrate's Court claimed both these dowries with their increase. The Respondent, Xatana, contested the action denying the allotment of Yawate to Appellant. The Magistrate found Appellant, Sangqu, to be entitled to the cattle paid by Simanga and their increase but that he was not entitled to recover the cattle paid by Bapeti, which both parties admit will have to be returned to Bapeti.

The Court after consulting the Native Assessors supports the ruling of the Magistrate on both claims.

In this Court a fresh issue is raised; it is contended that the Respondent, Xatana, was entitled out of Simanga's dowry to a refund of the expenses he incurred in the marriage of Yawate but as no evidence was led to show the nature of these expenses this Court is unable to deal with the question which should have been raised in the Magistrate's Court as an alternative plea or claim in reconvention.

The appeal is dismissed with costs.

The cross-appeal is dismissed with costs.

Butterworth. 21 November, 1910. A. H. Stanford, C.M.

Jassop vs. Mkutuku.

(Tsomo.)

Jurisdiction—Interdicts—Exception.

Jassop in his summons stated: "He is the eldest brother of the late Jozana who died about June of last year, and he, Plaintiff,

is guardian of the minor heir Mdinge of the late Jozana. That since the death of the said Jozana Defendant has wrongfully interfered with Plaintiff's rights in his capacity as guardian. Wherefore Plaintiff claims an order of the Court restraining Defendant from interfering with his rights and the management of the Estate of the late Jozana."

Defendant Mkutuku excepted that it was not competent for the Court to grant the order asked for because the order could not be carried into effect or execution by any process of Court as against Defendant.

The Magistrate sustained the exception and Plaintiff appealed.

Pres.:—The summons does not state the acts or nature of the interference alleged and asks the Court to exercise a power which it has no means of enforcing and which is consequently beyond its jurisdiction. This being so the exception was rightly sustained by the Magistrate.

The appeal is dismissed with costs.

Butterworth. 21 November, 1910. A. H. Stanford, C.M.

Gunqashi vs. Cunu.

(Idutywa.)

Marriage Dissolution—Repudiation—Deductions for Children and to mark Dissolution.

Gunqashi sued Cunu for one beast or £5 and in his summons said that before the 1877 war he married Nolausi, Defendant's sister and paid nine head for her as dowry, that Nolausi had now deserted him and was married to another man, that eight children were born of the marriage between Plaintiff and Nolausi and that he is entitled to one beast after a deduction of a beast for each child born had been made. He therefore sued for the remaining beast.

Defendant pleaded that four head only were paid and four children were born of the marriage; but further stated that about 27 years ago Plaintiff had driven Nolausi away and that only after this was she remarried.

The Magistrate found on the evidence that Plaintiff had dissolved the marriage by driving away his wife some years before because she contracted small pox and that he was therefore not entitled to

recover any cattle to mark the dissolution of marriage and quoted the case of *Magandela* vs. *Nyangweni* (N.A.C. p. 14).

Plaintiff appealed.

Pres.:—When a woman leaves her husband and will not return to him although the number of children born of the marriage may be greater than the number of cattle paid as dowry it is customary for one beast to be returned to mark the dissolution of the marriage. But where the husband himself dissolves the marriage by driving his wife away then he is not entitled to recover any of the dowry paid.

In the present case the Magistrate has found that the Appellant drove away his wife some 26 years ago and until now has never made any effort to obtain her return thus showing that her statement that she was driven away is correct. Under such conditions the Appellant cannot succeed, the marriage is not being annulled by the present action but was dissolved by the Appellant himself 26 years ago when he drove away his wife.

The appeal is dismissed with costs.

Butterworth. 21 November, 1910. A. H. Stanford, C.M.

Sigidi vs. Mqezana.

(Idutywa.)

Spoor Law—Women as Guardians—Costs—Procedure.

Sigidi instituted proceedings under Section 1, Act 41 of 1898, and Section 202, Act 24 of 1886, against Mqezana, "assisted by his mother, Nofayile," for the value of a pig, the spoor of the pig having been traced to Mqezana's kraal.

In the course of the hearing it was admitted that Defendant's uncle, Mkwambi, was his guardian (his father being dead), and the Magistrate absolved Defendant from responsibility with costs, on the grounds that his legal guardian should have been joined with him in the summons.

Plaintiff appealed.

The following were the Magistrate's reasons:—

"It is clear Native law that the guardian of a minor, on the demise of his father, is the nearest male relative—he being a major (*Magwaxaza* vs. *Nomkazana*, Henkel, p. 66). The mother

and widow is not competent to occupy that position. The case of *Gontsana and Others* vs. *Konzana* (Henkel, p. 213) laid down that a Spoor Law case is a purely civil action. The attorney for the Respondent contended from the outset that Mqezana should have been joined with his guardian, Mkwambi. This was noted as an exception in the ordinary manner, as Section 202 of the Penal Code provides that the matter shall be inquired into 'summarily and without pleading.' As it has been ruled a civil action, however, it is necessary for the minor to be properly represented in Court. The Respondent was summoned without such proper representation, and a judgment equivalent to one of absolution was entered.

"Judgment was based solely on that ground, but the Court at the same time intimated that, in its opinion, either an actual tracing of the spoor or identification of the remains was essential to establish liability (*vide* the case of *Queen* vs. *Mbalo* (10 Juta, 380) and the two Native Appeal Court cases of *Tyaliti and Others* vs. *Sindiwe* and *Gontsana and Others* vs. *Konzana*).

Pres.:—Reference to the decisions of the Higher Courts show that it has been ruled that actions brought to recover the value or damages for stolen animals under the provisions of the Penal Code and Act 41 of 1898 are to be regarded as purely civil actions, in which costs of suit can be claimed. This being so, the principles of ordinary civil procedure must apply, except in so far as modified by the Acts quoted.

The Appellant, a minor, is sued as the head of the kraal, his mother being joined with him as guardian, but it is clear that, according to Native custom, she is not the guardian, and it is admitted that Mkwambi is. Respondent by his evidence was well aware of this, Mkwambi being resident in the location. The Court is therefore of opinion that Mkwambi, and not Nofayile, should have been cited as guardian.

The appeal is dismissed with costs.

Butterworth. 22 November, 1910. A. H. Stanford, C.M.

Dyomfana vs. Klassie.

(Willowvale.)

Dowry—Ranking of Increase—Engagements to Marry.

Dyomfana sued for the return of ten head of cattle, together with three increase, paid as dowry in respect of his engagement

to marry Defendant's daughter. He stated he was ready to proceed with the marriage, but Defendant demanded more dowry, but he, Plaintiff, contended that the ten head with increase of three were sufficient. He therefore asked for an order for the return of the 13 head of cattle, if Defendant was unwilling to allow the marriage to proceed. Defendant pleaded that the amount of dowry agreed on was 12 before marriage and two after marriage, and that he was ready to proceed with the marriage on payment of further two head of cattle.

After evidence Plaintiff asked for judgment, on the ground that increase of dowry before marriage is always reckoned for the benefit of the bridegroom until marriage, and that Defendant had now thirteen head. The Magistrate refused judgment, and Plaintiff appealed.

In his reasons the Magistrate said:—"Whilst admitting that under Native custom, until the marriage ceremony has taken place, the dowry and its increase is considered to be the property of the bridegroom, I am not aware that increase can be considered to go towards making up the balance of dowry due. If this were the case it would lead to endless abuse; a man who had promised to pay certain number of cattle, after paying portion, would claim, on its increasing to the number agreed upon, to have paid the whole of the dowry."

Pres.:—The Appellant became engaged to the Respondent's daughter, and a marriage was arranged to be entered into when the Appellant had paid twelve head of cattle as dowry. He paid ten, which have increased to thirteen head. Appellant now contends that he is entitled to rank the increase as dowry paid by himself.

Where cattle are paid on account of a marriage to be celebrated later, if the marriage negotiations are broken off by default of the father or his daughter without just and sufficient cause, the suitor is entitled to recover the cattle paid by him, together with their increase. If the marriage is celebrated the increase becomes the property of the father, but does not count in the dowry. In the present action the increase cannot be reckoned in the dowry.

The appeal is dismissed with costs.

Kokstad. 8 December, 1910. A. H. Stanford, C.M.

Jan Lesapo vs. M. Lesapo.

(Matatiele.)

Matlala Cattle—Basuto Custom.

This was a dispute about Matlala cattle. The following interrogatories were put by Plaintiff's attorney to the Paramount Chief Letsie, of Basutoland:—

Q. 1.—To whom and by whom is the Matlala beast or cattle paid?

Ans.—The Matlala beast is paid by the bridegroom to the father and mother of the bride; that is to say, he pays dowry, and out of the dowry the Matlala beast is selected by the father, and it and the increase are reserved for future use should there be any marriages in the family.

Q. 2.—When paid is the Matlala beast absolute property of the person to whom it is given? And can he dispose of it and its increase as he wishes?

Ans.—Yes, inasmuch as it is paid to the father of the family, and he uses it as stated in question 1.

Q. 3.—On the death of the party to whom Matlala has been given who, according to Basuto custom, would inherit the said beast and its increase? Would the eldest son and heir of the party to whom it has been given inherit such cattle, or would the party who originally gave it to them get the Matlala beast and increase back again?

Ans.—It would be handed on to the eldest son as heir to his father's estate, and he would use it for the benefit of the family, as previously stated. It is never the case that the Matlala cattle are paid back to the person who gave them originally.

Plaintiff put the following case to the Paramount Chief:—

Ralesapo's eldest son and heir, Lesapo, predeceased his father, the said Ralesapo, but leaving Mokuinihi Lesapo as his eldest son and heir him surviving. Jan Lesapo was a younger brother of Lesapo, and therefore uncle of Mokuinihi Lesapo.

That Jan Lesapo paid to Ralesapo during his lifetime a certain beast as Matlala in accordance with Basuto custom.

That this beast was paid away by old Ralesapo as dowry for one of his grandsons, but the beast had certain increase, which

at the death of Ralesapo numbered about eight, and now number eleven.

Now Mokuinihi claims these cattle as the eldest son and heir of Lesapo, who was eldest son and heir of Ralesapo, and on the other hand Jan Lesapo states that according to Basuto custom, he having given the Matlala beast to old Ralesapo, is entitled to get the beast and its increase back after Ralesapo's death. Please state who as between Mokuinihi Lesapo (the eldest son and heir of Ralesapo) and Jan Lesapo—the donor of the cattle—is heir to these cattle?

Ans.—In the case quoted, Mokuinihi, as the eldest son and heir of Lesapo, who in turn was the eldest son and heir of Ralesapo, is the rightful heir to these cattle, and Jan Lesapo has no claim to them whatever as the original donor.

The Defendant put the following cross-interrogatories:—

Q. 1. To whom is Matlala given, by the person receiving "ditsua"—whether to his father only, or to his father and mother jointly?

Ans.—The Matlala beast is selected by the father of the bride out of the dowry paid by the bridegroom, and is retained by him as head of his family until a marriage takes place in the family, when the original beast or some of its increase may be paid out on behalf of the son who is getting married.

Q. 2.—What rights become vested to Ralesapo's widow upon the death of Ralesapo?

Ans.—She inherits the estate with her eldest son, who is, of course, the heir. According to Native custom no woman has any rights, but the son would naturally consult with his mother upon any question relating to his father's estate.

Q. 3.—Can Plaintiff claim to have possession of the Matlala cattle as against the wishes of Ralesapo's widow, or without her consent?

Ans.—Plaintiff would have to consult with his mother as to the disposal of the cattle, but they are in his charge; but he would naturally consult with his mother before disposing of them.

Q. 4.—At the death of Ralesapo to whom did the Matlala cattle belong?

Ans.—To his grandson Mokuinihi, his father Lesapo being dead.

Q. 5.—At the death of Ralesapo's widow, to whom will the Matlala cattle belong? Is it essential, or at least customary, for

the person receiving Matlala to consult the person giving the Matlala before parting with the Matlala; that is (*a*) parting with the entire ownership in the Matlala, such as by selling it or paying it away as dowry or otherwise, or (*b*) parting with the possession of it, as by lending it as Nqoma or for milking purposes?

Ans.—As previously stated, the Matlala is not the direct present of the bridegroom, but is selected from the dowry paid by him; therefore there would be no question of the bridegroom being consulted as to the disposal thereof any more than there would be of consulting him as to the disposal of the dowry cattle.

The Magistrate gave judgment for Plaintiff, and Defendant appealed, but the Appeal Court dismissed the appeal.

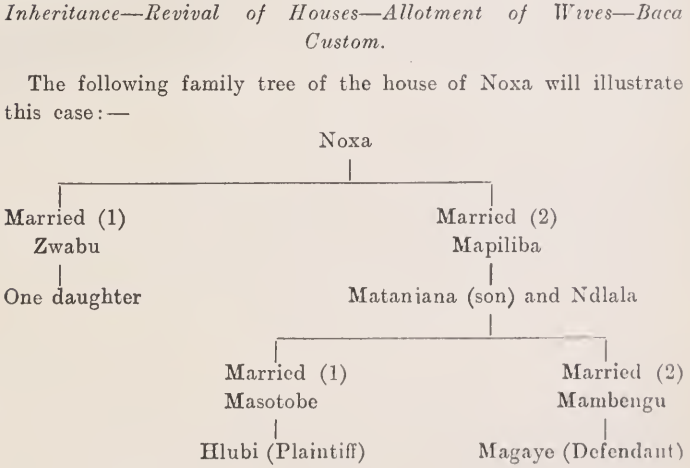
Kokstad. 9 December, 1910. A. H. Stanford, C.M.

Hlubi vs. Magaye.

(Umzimkulu.)

Inheritance—Revival of Houses—Allotment of Wives—Baca Custom.

The following family tree of the house of Noxa will illustrate this case:—



Hlubi sued Magaye for the delivery of certain cattle, property of the house of Matanjana, and inherited from Noxa.

Noxa, his great wife, Zwabu, and Matanjana were now dead.

Plaintiff alleged that as eldest son of Matanjana he was heir of the property inherited from Noxa by Matanjana.

The defence was that Hlubi was heir only of the house of Zwabu, and Defendant was heir of the house of Mapiliba. A witness, Ndlala, brother of Matanjana, in his evidence, described the arrangement made by Noxa, which was that Matanjana should marry his first wife, Masotobe, as seed-raiser to Zwabu, who had no male issue, and thus revive that house, the dowry for Masotobe being paid out of this house. The second wife was Mambengu, her dowry being paid out of Mapiliba's hut. Matanjana acquiesced in this arrangement.

Plaintiff denied that any such allocation of wives took place, and contended that as eldest son of Matanjana he was entitled to the property left by him.

The Magistrate found that the allocation described did take place, and gave an absolution judgment.

Plaintiff appealed.

Pres.:—The matter having been submitted to the Native Assessors, they say the arrangement described by the witness Ndlala is in accordance with well-known Native custom, that under such conditions Appellant is heir only to the first house of Noxa, and Respondent is heir to the second house, that of Mapiliba.

The Magistrate has found on the evidence that the late Matanjana did place his wives in the way stated, and on the evidence this Court sees no grounds for disturbing his judgment.

The appeal is dismissed with costs.

Flagstaff. 15 December, 1910. A. H. Stanford, C.M.

Kolwa vs. Moyeni.

(Bizana.)

Seduction and Pregnancy—Scale of Damages—Pondo Custom.

This was an action for five head of cattle as damages for seduction and pregnancy.

The Magistrate awarded four head, and Defendant appealed, on the ground that this award was excessive.

The Magistrate in his reasons stated that it was the practice of the Court to award from three to five head for cases of this

nature, and considered four head an equitable judgment, taking the circumstances of the case into consideration.

Pres.:—According to the Native Assessors the amount of damages for seduction of a girl resulting in pregnancy for common persons is from three to five cattle, in accordance with the discretion of the Court. In the opinion of the Court the damages awarded are not excessive. The appeal is dismissed with costs.

Flagstaff. 15 December, 1910. A. H. Stanford, C.M

Daza vs. Ngetshola.

(Flagstaff.)

Grass Fires—Damages—Parental Responsibility—Pondo Custom.

Ngetshola sued Daza for £80 as damages for the destruction of his huts, caused by a grass fire lighted by the minor child of Defendant. The fire was accidently started by the small child of Defendant, who dropped some lighted dung in the veld while carrying fire from one hut to another. Defendant was away, and there were no adults left at the kraal.

The Magistrate gave judgment for Plaintiff, holding the accident was due to Defendant's contributory negligence in not leaving some responsible person in charge of the kraal.

Defendant appealed.

Pres.:—The matter having been submitted to the Native Assessors, they state that according to Pondo custom that if a grass fire is started by accident by a child, and does damage, the father of the child is not responsible; even if children wilfully start the fire the father is not responsible. That if a person accidentally sets fire to the grass, say in smoking, and he does not see it, and that fire does damage, he is not responsible; but if a person, in the face of remonstrance, fires the grass, he is liable for damage done by that fire. This being the Native custom, it is obvious that no action lies for damage under such circumstances.

The appeal is allowed with costs, and judgment in the Magistrate's Court altered to judgment for the Defendant with costs.

Flagstaff. 15 December, 1910. A. H. Stanford, C.M.

Qaji Mzaba vs. Macala.

(Tabankulu.)

Dowry Restoration—Widow's Re-marriage—Desertion—Guardianship of Children—Manci Customs.

Macala sued Qaji for the return of his wife, who had deserted him, or her dowry, ten head of cattle, and for the restoration of his daughter born of the marriage.

From the evidence it appeared that Macala had married the woman in question from her father's kraal. She was a widow, and had borne children to her first husband. There was one child of the second marriage, and this child had accompanied her mother when she left Plaintiff, and both were now living with the first husband's relations.

The Magistrate ordered the return of the dowry, allowing one beast for the marriage expenses and one for the child, and also declared Plaintiff the guardian of the child.

Defendant appealed.

Pres.:—The matter having been submitted to the Native Assessors, they state that when a widow returns to her father, and is given in marriage by him to a second husband, and if afterwards the woman leaves her second husband, having had children, and returns to her children at her deceased husband's kraal, the dowry paid by the second husband is not returnable by the father, but the second husband is entitled to the children of his marriage—that his action for the children is against the person who gave him the woman in marriage.

The appeal is allowed with costs, and the Magistrate's judgment is altered to judgment declaring the Plaintiff the lawful guardian of the girl Mqadukazi, with costs of suit.

Butterworth. 6 March, 1911. W. T. Brownlee, A.C.M.

Dyongo vs. Nani.

(Idutywa.)

Fines for Abduction—How Collectable—Dowry—Killing.

Dyongo sued for the return of one beast, which he alleged he had paid Defendant on account of dowry for Defendant's daughter.

Defendant denied that the beast in question was paid as dowry, but as fine for abduction.

In evidence it appeared that the girl was abducted as a preliminary to marriage, and when Defendant's representatives came for her one beast was handed over and a sheep killed. Defendant contended that the animal was paid as fine, and not as dowry.

The Magistrate gave judgment for Defendant, and Plaintiff appealed.

Pres.:—In the opinion of this Court the Magistrate in the Court below has erred in his decision. It is true, as a general rule, that in cases where girls have been abducted, and where the cattle paid are driven off by the girl's friends, these must be regarded as having been paid as a fine, and not as a dowry; but in this case, though the beast paid was driven off by the girl's brother, Guma, yet it appears from the evidence that he himself suggested to Plaintiff that the girl should be abducted as a preliminary to marriage, and it also appears from the evidence of the Plaintiff's witness, Finciwe, his sister, that a sheep was killed for Guma when he came for her, and it is quite contrary to custom to kill for persons to whom a fine is being paid. It is unfortunate for the Defendant that Guma is not present to give evidence for him, but Ntloyiya, who is Defendant's cousin, and also accompanied Guma, states the beast paid by Plaintiff was paid as dowry. Defendant himself knows nothing as to the nature of the payment made.

The appeal is allowed with costs, and the judgment of the Court below altered to judgment for Plaintiff as prayed with costs.

Butterworth. 7 March, 1911. W. T. Brownlee, A.C.M.

Dilikane vs. Mazaleni.

(Willowvale.)

Wedding Outfit—Marriage Expenses—Refunds—Transkei.

Plaintiff Dilikane sued for the return of a wedding outfit or one beast or its value. He alleged in his summons that Defendant agreed to marry his daughter, and paid six head of cattle as dowry, but the girl rejected Defendant, and the dowry was returned in full. Plaintiff had supplied a wedding outfit, which was still in Defendant's possession, who refused to give it up.

Defendant pleaded that a marriage had actually taken place, but the girl had deserted him a few days after. He tendered restoration of the wedding outfit supplied provided Plaintiff reimbursed him for the entertainment provided for the *duli* party, who had stayed at his kraal for some two weeks. As the conditional tender was refused, he counterclaimed for three sheep and two bags of mealies supplied to the wedding party.

The Magistrate gave judgment for Defendant on the principal claim, and on the claim in reconvention judgment for Defendant in reconvention, on the grounds that neither claim can be established in a Court of law.

Plaintiff appealed.

Pres.:—The appeal in this case is in the claim for return of wedding outfit. This Court is not aware of any case in which any deductions have been allowed in this Court in the Transkei for wedding outfit, and is of opinion that the decision of the Court below on this point should stand.

The appeal is dismissed with costs.

Umtata. 14 March, 1911. W. T. Brownlee, A.C.M.

Nobumba vs. Mfecane.

(St. Mark's.)

Ukufakwa—Ukwenzelelele—Tembu Customs.

Plaintiff Nobumba sued for a beast which he alleged was due to him from Defendant, in return for an animal supplied by him in 1885 to Defendant under the *ukufakwa* custom. He alleged that defendant had promised to repay the beast when he received dowry for his first born daughter. The girl was now married, and Defendant had received dowry, but he now refused to fulfil the contract.

Defendant admitted receiving the beast under the custom of *ukwenzelelele*, but denied that there was any obligation on him to refund.

Native Assessors in the Magistrate's Court stated as follows:—"The two matters are entirely different. We know that relatives go to one another and ask for help. This applies to relatives, and is *ukwenzelelele*. The relatives look into the matter and assist

with one beast, a beast of any kind. This beast is paid as dowry. This beast is a gift, and there is no liability to return it. The parties might quarrel about other matters, but about this beast never. It is help, and the foot is kissed in satisfaction.

"As regards *ukufakwa*, no thanks is given for the beast, which must be replaced, no matter if all the cattle die. We are surprised to hear of this claim. Plaintiff did not hesitate in saying his father called them together, and that it was *ukwenzelelele*. The two customs are quite distinct. If you mix them up you get no beast at all. If a man accept a beast after asking for it, and promises to return another in its place, it is loan."

The Magistrate gave judgment for Defendant, and Plaintiff appealed.

Pres.:—In this case the claim is brought under the Native custom of *ukufakwa*, and the defence is that the animal in respect of which the claim arises was given to Defendant, not under the custom of *ukufakwa*, but under that of *ukwenzelelele*, and the two are distinct, for the one, that of *ukufakwa*, applies where contributions are made in connection with the ceremonials connected with the puberty or marriage or other circumstances of women in which the contributor is *fakwaed* or put into the dowry of the woman; the other, that of *ukwenzelelele*, applies to the affairs of men, and is the contribution of one man to another, usually a relation, who is about to take to himself a wife, and requires cattle with which to pay dowry. Both these customs, however, have the same effect, for in the case of each the contributor expects to receive some return for the contribution made by him; in the case of *ukufakwa*, from the dowry of the woman in respect of whom he has been "put in," and in the case of *ukwenzelelele*, from the dowry of the first girl to be born of the marriage in respect of which the contribution has been made.

The point in dispute in this case has been put to the Native Assessors, and they state that under the custom of *ukwenzelelele* the contributor expects a return, and may recover it by action at law, Assessor Bam, however, differing in this respect, that he holds that there is no action at law under this custom, and that should action be resorted to, this would be the destruction of friendship. The Native Assessors further state that there is this peculiarity in connection with the custom of *ukwenzelelele*, that when contributions under it are made to the dowry to be paid

by a Chief for his great wife no return is expected, as the Chief is marrying the mother of the tribe.

This Court is met with this difficulty, that there is a disagreement in the opinions of the Native Assessors in this Court from that of those called by the Magistrate in the Court below, but it is of opinion that the statement of custom as made by the Assessors here is the one to be accepted and followed, for it is in conformity with the decisions of this Court already laid down in various cases, notably the following: *Nzima* vs. *Hlahleni* (N.A.C.R. 35), *Kokwe* vs. *Gubila* (N.A.C.R. 48), and *Njoko* vs. *Gqozombana* (N.A.C.R. 205).

The main facts in this case are not disputed. The Defendant acknowledges having received a beast from the late Nobumba with which to pay dowry, he admits that Nontwana is the issue of the marriage in respect of which the beast in question was contributed, and he admits that Nontwana has been married and dowry paid for her, and he relies solely upon the custom *ukwenzelelele* in his defence.

In the opinion of this Court he is not entitled to succeed in his defence, and the appeal is allowed with costs, and the judgment of the Court below altered to judgment for Plaintiff as prayed with costs.

(Messrs. Bell and Bunn, Assessors, dissented.)

Umtata. 15 March, 1911. W. T. Brownlee, A.C.M.

Noenjini vs. Nteta.

(St. Mark's.)

Divorce at Instance of Wife—Marriage under Native Custom.

Noenjini asked for dissolution of the marriage under Native custom existing between her and her husband Nteta, on the grounds of cruelty and neglect. The marriage had been entered into before Rinderpest, eight head being paid. Five children were born and a marriage outfit was supplied. She tendered two head, which Defendant refused.

Defendant stated his wife had deserted him, and had been away some years, during which she had become pregnant. He did not desire dissolution of the marriage, and he denied cruelty or neglect.

The Magistrate refused the order, and in the course of his reasons said:—"On the question of cruelty she herself says she was never *telekaed* on that account, though asserting she has on many occasions been beaten by Defendant, and once stabbed with an assegai. These matters are ancient history, and I very much doubt the truth thereof. It is strange that the woman's people should not have appeared to support her, for it would have been in their own interest to have done so. According to Plaintiff's own showing she has since she left her husband become pregnant through adultery with a person whose name she refuses to divulge. Her own father went to fetch her from the doctor once, and she refused to go. There is not a tittle of evidence on which to found an order of divorce, which would simply mean the release of a woman from the marriage contract which she herself has violated by adultery, and the escape of the adulterer from the consequences of his wrong."

Plaintiff appealed.

Pres.:—The Plaintiff may at any time divorce herself by returning to the Defendant the dowry paid by him for her, but when she comes to the Court to ask for an order for divorce it becomes necessary for her to show good and sufficient cause for the granting of such an order, and in this case this Court is of opinion that the Plaintiff has not made out a good case, and that the Magistrate in the Court below is right in refusing this order.

The appeal is dismissed with costs.

Umtata. 16 March, 1911. W. T. Brownlee, A.C.M.

Bango vs. Kwekwe and Mjacu.

(St. Mark's.)

Civil Imprisonment—Cases under Native Custom—Kraal Head Responsibility—Powers of Court.

Bango applied for writs of civil imprisonment as against Kwekwe and his father Mjacu.

In dismissing the summons the Magistrate said:—

"Judgment had previously been given against Kwekwe for adultery and Mjacu, as head of the kraal, for three cattle or £15 jointly and severally, one paying the other to be absolved, the

action having been brought under Native law and custom. The question now is, can a remedy under Colonial law be applied to meet a judgment under Native law and custom, which provides no such punishment? I do not think it can. Native law is not silent on the point. It affords a remedy, that of "eating up," so that it is not a question of founding a process in aid. I would agree that where Native law and custom provides a remedy *contra bonos mores* the Courts would not enforce it, but no such argument can be applied in this instance. European law has a similar provision. It may be argued that at the present day Natives work for wages; many do not possess cattle, and cannot therefore be reached by the creditor under Native custom. It is for the legislature, and not the judge or the administrator, to provide the remedy. There is no power in the administrative authority to interfere with the liberty of the subject. Civil imprisonment is interference with the liberty of the subject, and definite and specific authority must be vested in the Court before any decree can issue, and there is no express authority in cases between Natives tried under Native law. It is not a question of procedure, for which provision is made. There are several Proclamations dealing with civil imprisonment procedure in these Territories which must be taken to apply to cases under Colonial law, for civil imprisonment is not known in Native law, and nowhere is the fact of its application to Native cases mentioned. In the present case Defendant (Mjacu) would under Colonial law have incurred no liability whatsoever, yet it is sought to punish him under the provisions of that very law."

Plaintiff appealed.

Pres.:—The only point raised in this appeal is whether it is or is not competent to issue a decree for civil imprisonment in cases between Natives in the Native Territories, and in the opinion of this Court, broadly speaking, it is competent.

Section 23, Proclamation 140 of 1885, confers unlimited jurisdiction in all civil cases upon Magistrates in the Transkei, and it would be absurd to hold that a Magistrate, while having the jurisdiction conferred upon him of giving a judgment in any case, should yet not have the same means of giving effect to such judgment. Native law and custom does not provide the necessary means, but procedure under the Statute Law does, and the section above referred to provides that while Native law shall be applied

in cases where the parties are both Natives, the procedure to be followed shall, as far as possible, be that of the Courts in the Colony. In the opinion of this Court, therefore, the Magistrate in the Court below has erred in his decision in so far as the first Defendant is concerned.

As regards the second Defendant, however, the position is quite different, and this Court is of opinion that the judgment of the Court below must stand. It is only a very peculiar provision of Native law which renders an otherwise innocent person responsible for the torts of another simply by reason of the fact that he is what is commonly known as the "kraal head" of that other person. Civil imprisonment is unknown in Native law, and in the opinion of this Court should not be applicable to persons who but for the special provisions of Native law could have no judgment given against them in connection with acts not committed by them.

The appeal is dismissed with costs in so far as Defendant No. 2 (Mjacu) is concerned, and as regards Defendant No. 1 the appeal is allowed with costs, and the ruling of the Court below set aside, and the case remitted to the Court below to be heard upon its merits.

Umtata. 17 March, 1911. W. T. Brownlee, A.C.M.

Mxalisa vs. Mtyuntyane.

(Umtata.)

Nqoma Custom.

In this case Plaintiff Mtyuntyane had lent Defendant a mare under the custom of *ukunqoma*, and now sued for its return. Defendant admitted the loan, but claimed that he was entitled to some consideration for farming the animal. Plaintiff tendered a sheep, and the Magistrate gave judgment for the delivery of the mare on payment of the tender. Defendant appealed on the ground that as the animal in question had had increase he was entitled to more than the Court had awarded him.

The Appeal Court obtained the following statement of the Nqoma custom from the Native Assessors:—

"An animal, usually a cow and a calf or a heifer, is loaned for milking purposes, and there is no specified time at which the

lender may demand the return of the animal loaned. Should he need it he may demand its return at any time. Should it have increase the person to whom it is loaned expects to get something out of the increase for his services in farming the animal. Should it not have increased he is entitled to nothing."

The appeal was allowed, and the case remitted to be tried on its merits.

Umtata. 17 March, 1911. W. T. Brownlee, A.C.M.

Ntwanambi vs. Poti.

(Qumbu.)

Maintenance—Illegitimate Children—Costs.

Plaintiff's wife had committed adultery at Defendant's kraal. She became pregnant and the child was born at Plaintiff's kraal, and was afterwards taken by the mother to Defendant's kraal, where it was brought up. Plaintiff Ntwanambi now sued for the recovery of this illegitimate child, but Defendant refused to give it up unless maintenance was paid. Plaintiff stated he was not liable for maintenance, as the child was illegitimate.

The Magistrate gave judgment as follows:—

"The Defendant is ordered to return the child to Plaintiff on payment by the latter of a beast for maintenance of the child. No order as to costs."

Plaintiff appealed.

Pres.: The main points raised in this case in the Court below having been put to the Native Assessors, they state that under Native custom the Defendant is entitled to demand maintenance, and that if Plaintiff wished to repudiate the child he should not have brought the woman home and should not have allowed the child to be born at his place. By acting as he has done and by now claiming the child he is acknowledging the child as his, and so is liable to pay maintenance.

In the opinion of this Court the decision of the Magistrate in the Court below is right.

On the point of costs raised in the appeal, this Court is of opinion that there is no reason to disturb the decision of the Court below. The Defendant—the Respondent here—has to all

intents gained his case, and the Magistrate in the Court below would have been justified in going further than he did, and might have ordered Appellant—Plaintiff in the Court below—to pay costs.

The appeal is dismissed with costs.

Umtata. 17 March, 1911. W. T. Brownlee, A.C.M.

Sogoboza vs. Finini.

(Qumbu.)

Widows—Illegitimate Children—Ownership.

Plaintiff Sogoboza sued Defendant for eight head of cattle, being the dowry received for the illegitimate daughter of Plaintiff, born of a widow, Defendant's sister. Plaintiff alleged he had paid a fine to Defendant for causing the pregnancy of his sister, and the agreement was that the child should be his.

Defendant admitted his sister was a widow at the time pregnancy was caused, but denied that Plaintiff paid any fine.

The Magistrate gave judgment for Defendant with costs, and Plaintiff appealed.

In dismissing the appeal the Appeal Court said:—

This Court is of opinion that even supposing the Plaintiff had paid a fine for his intercourse with Vimbashe, the outcome of such intercourse would be the property of the heirs of the woman's deceased husband unless the dowry paid by him had been returned, and no attempt has been made to show that this has been done.

Umtata. 18 March, 1911. W. T. Brownlee, A.C.M.

Comololo vs. Comololo.

(Umtata.)

Great House and Right Hand—Dowry—First Daughter of Subsidiary House—Division of Dowry Between Houses.

Plaintiff claimed to be the eldest son of the right-hand house of the late Gomololo. Defendant was the eldest son of the Great house. Plaintiff's sister Ellen had been married, and Defendant had received the dowry—eight head of cattle—and Plaintiff

claimed these cattle as heir of the right-hand house. Defendant contended that Plaintiff was not heir of the right-hand house, but son of the Qadi of the Great house.

The Magistrate awarded the eight head of cattle claimed, and Defendant appealed. In the course of his reasons the Magistrate said:—"Apart from the very strong evidence that Plaintiff was the eldest son of the right-hand house, it is most inconsistent with Native custom for a man to marry a 'Qadi' wife before the establishment of his right-hand house; this is rarely done, and then only when the Great wife is barren. Plaintiff's mother is admitted to be Gomololo's second wife. The Great wife was not barren, for she bore the Defendant. I found it proved that Plaintiff is the heir to the right-hand house of the late Gomololo, that Ellen is Plaintiff's sister belonging to the right-hand house, that Plaintiff is entitled to her dowry, and that in this case eight head were paid for her. It may be argued that Defendant is at least entitled to something from this dowry for his expenses incurred in connection with the marriage, but Defendant admits the dowry has increased by three, and as Plaintiff has made no claim to the increase, which apparently was an oversight, I consider that Defendant is amply reimbursed for such expenses."

Pres.:—It is admitted that the woman Ellen, in respect of whose dowry this action is raised, is of the same house as the Plaintiff, and the particulars of the case having been put to the Native Assessors, they state that the custom under which the first daughter of a Qadi house is given to its principal house invariably applies also as between the right-hand house and the Great house —Assessor Koyi dissenting. The whole of a man's property, in the first instance, appertains to the Great house, and it is by the disposal of the property of this house that a wife is procured for the right-hand house; and furthermore, to establish the right-hand house in the possession of stock, cattle are again taken from the Great house; and it is therefore reasonable and customary that a return should be made to the Great house, and this is done by the allocation to the Great house of the first daughter of the right-hand house. It is, however, customary that a part of the dowry of this girl should be apportioned to the right-hand house by the Great house.

In the opinion of this Court the Defendant is right in maintaining that the dowry of Ellen appertains to him as the repre-

sentative of the Great house, whether she be the daughter of a Qadi of that house or the daughter of the right-hand house, and that the Magistrate in the Court below has erred in his decision, and the decision of the Court below will be so altered as to confirm the Defendant in the possession of Ellen's dowry, and allow the Plaintiff the portion which should be given to him.

The appeal is allowed with costs, and the judgment of the Court below altered to judgment for Plaintiff for four head of cattle and costs.

Umtata. 18 March, 1911. W. T. Brownlee, A.C.M.

Tshubela vs. Zitikine.

(Port St. John's.)

Adultery—Committal of at Defendant's Kraal—Ntlonze.

Zitikine claimed three head of cattle as damages for adultery.

It appeared that the woman in question was living at the kraal of her brother Jongilahle. It was alleged that Defendant took the woman from a beer drink at another kraal to his own kraal, and they were found there in the store hut the same evening by Jongilahle, who was searching for his sister. No *ntlonze* was taken, but Jongilahle was assaulted by Defendant, who was afterwards convicted. Defendant denied adultery, and stated the assault was caused by Jongilahle's own actions.

The Magistrate, believing Plaintiff's witnesses, gave judgment as claimed, and Defendant appealed.

Pres.:—In this case the Appellant points out that there is no *ntlonze* and no catch by the husband, and also points out the fact that the alleged catch by the woman's brother Jongilahle was made at the Defendant's own kraal, and points out the improbability of an adulterer taking his paramour to his own kraal for the purposes of illicit intercourse.

The first point has already been decided in the case of *Nomandi* vs. *Njojo*, heard in this Court on 18th July, 1910, and the second point having been put to the Native Assessors, they state that they have never heard of a case in which an adulterer has been caught at his own kraal, and that it is improbable that he would commit an act of adultery there, but that should such a charge

be brought against him the case would be decided by the weight of the evidence. This Court, while quite agreeing with the Native Assessors in considering such an act as highly improbable, yet in this case is of opinion that the decision of the Court below should stand.

Jongilahle has no interest in giving the evidence which he has given, for this is not a case of pregnancy, in which the onus lies upon him of accounting for his sister's condition, and the Defendant himself admits that Jongilahle was at his kraal and was assaulted there on the occasion in question. The only point then remaining to be decided is: Was Jongilahle there under the circumstances described by himself, or was he there unlawfully, as is described by Defendant?

The Magistrate in the Court below believes Jongilahle, and in the opinion of this Court he is right.

The appeal is dismissed with costs.

Umtata. 18 March, 1911. W. T. Brownlee, A.C.M.

Zamana vs. Bilitane.

(Port St. John's.)

Bopa Fees—Abduction—Connivance of Guardian.

Zamana sued Defendant for two head of cattle which he alleged he had paid as engagement beasts in respect of a marriage proposed with Defendant's daughter. He stated Defendant accepted these two animals and then told him to take the girl. He then abducted the girl, and she was next day fetched by her father, who told him he was going to provide her with clothing. The girl had now been married to another man.

Defendant stated one beast had been paid as *bopa* when he fetched his daughter from Plaintiff's kraal. He added that he had married his daughter to another man, as Plaintiff had no cattle.

The Magistrate gave an absolution judgment, and Plaintiff appealed.

Pres.:—In this case the Magistrate in the Court below has decided upon the evidence that the animal paid by Plaintiff was paid as a *bopa* fee, and not as dowry. The evidence on this point

does not seem to be very conclusive, and there seems to be reason to believe that the Plaintiff's story, that the Defendant told him to abduct the girl, is the correct one. He says that Defendant told him to abduct the girl, and that he reported the abduction to Plaintiff, and Plaintiff himself admits that the abduction of the girl was reported to him, though he does not appear to have been asked who it was that made this report. It would seem from the evidence that there was not any search for the girl, but that the Defendant knew where to find her, and went straight to Plaintiff's kraal on the day following the abduction and demanded a *bopa* fee.

It is a very common thing for a parent to connive at, or even to encourage, the abduction of his daughter as a preliminary to marriage, especially should the girl be averse to the marriage, and it is questionable whether in such a case he would be entitled to demand a *bopa* fee.

The whole question of *bopa* fees is discussed in the case of *Nomdenge* vs. *Xontani* (N.A.C.R., p. 186).

This Court is, however, not in a position to say that the Magistrate in the Court below has erred in his decision upon points of fact. There is evidence to support his finding, and he is the best judge of the value of the testimony given before him, and as the judgment in this case is founded entirely upon the evidence, the appeal is dismissed with costs.

Umtata. 18 March, 1911. W. T. Brownlee, A.C.M.

Ncoto vs. Mbalo.

(Ngqeleni.)

Maintenance Fees for Married Women—Apportionment of Sister to Younger Brother—Maintenance by Elder Brother—Dowry.

Ncoto sued his elder brother, Mbalo, for three head of cattle paid him in respect of maintenance of a woman named Yoyose, his sister. It appeared Yoyose had been allotted to Plaintiff, who had received dowry for her. Some time after her marriage she left her husband and lived for some years at her mother's kraal, whence the husband eventually fetched her, paying three head to Defendant as maintenance. It was disputed whether Plaintiff or Defendant maintained their mother's kraal .

The Magistrate found that Defendant had been put to the expense of keeping Yoyose and her children, and was consequently entitled to the maintenance fees paid, and gave judgment accordingly.

Plaintiff appealed.

Pres.:—The Native Assessors, to whom the points at issue have been put, state that it is a common thing that when a sister has been apportioned to a younger brother, and after her marriage she has occasion to return to her people, that she should be there maintained by her elder brother, and if cattle are paid for such maintenance they are the property of the elder brother who maintained her, and are not regarded as dowry.

The Magistrate in the Court below has found upon the evidence that the woman Yoyose and her children were maintained by the mother of the Plaintiff and Defendant, at the behest of the Defendant, and at a kraal provided for her by Defendant; and that the means of maintenance were provided by the Defendant, and with this finding this Court sees no reason to disagree.

The appeal is dismissed with costs.

Umtata. 20 March, 1911. W. T. Brownlee, A.C.M.

Madotyeni vs. Tshwaqu.

(Ngqeleni.)

Nqoma Custom.

Plaintiff Madotyeni sued for five head of cattle or £50. He alleged in his summons that in 1899 he *nqoma'd* a she goat to Defendant's wife, that this goat by increase and exchange had increased to five head of cattle, and these he now sued for.

Defendant pleaded that the goat in question had been *nqoma'd* to himself, not his wife, that by increase and exchange it had increased to four head, and not five, and of these he maintained he was entitled to two, and he tendered the remaining two.

The Plaintiff refused the tender, and on the evidence the Magistrate found that there were five head, and gave judgment for two head to Plaintiff, absolution in regard to two, and awarded one to Defendant for his services in farming the cattle.

Plaintiff appealed.

Pres.:—The appeal in this case is on the point of the beast allowed to the Defendant by the Court below for his services in connection with the farming of the cattle in question and it is argued by the Appellant—the Plaintiff in the Court below:

1. That the loan or *Ngoma* having been made to the Defendant's wife and not to the Defendant he has no claim to anything.

2. That in any case, even granting that the loan had been made to him, he has no claim to any reward until he has rendered a complete and satisfactory account of all stock arising out of the loan.

3. That even should a complete and satisfactory account have been rendered no action lies for the recovery of any reward in connection with the farming of the loan. It is further argued that no proper account has been rendered.

The various points at issue having been put to the Native Assessors they make the following statement of custom:—

1. Cattle loaned to a woman under the *Ngoma* custom are under the power and control of the woman and when a reward is given for the farming of the *Ngoma* it is given to the woman and not to the husband.

2. If a person holding a *Ngoma* does not give a proper account of the cattle in his possession—and such account may be demanded at any time—he is not entitled to any reward. A reward is given to the holder of the *Ngoma* only after he has collected all the *Ngoma* stock and placed it before the owner.

3. The holder of the *Ngoma* may not dispose of any of the stock and in the case now under consideration the Defendant had no right to dispose of the first calf of the *Ngoma* heifer, even conceding his claim to it under the circumstances alleged by him without calling upon the owner to come and see it and deliver it to him.

4. Upon the return of *Ngoma* stock to its owner it is usual if the stock have increased to give the person loaned a reward but he may not claim it of right.

5. Should the person making the loan bring an action for the delivery of his property and the person holding the loan then make a demand for a reward in return for his successful farming of the stock judgment would not be given him but he would be told to go and make his request to his master.

6. The person making the loan may either go in person to demand the production of his stock or he may send to the holder to bring them.

The Court went on to say that two head appeared to be unaccounted for and until these were properly accounted for Defendant had no claim to any reward.

The appeal was allowed and judgment altered to judgment for Plaintiff for two head and absolution as regards the remaining three head.

Umtata. 20 March, 1911. W. T. Brownlee, A.C.M.

Somabokwe vs. Sicoto.

(Ngqeleni.)

Illegitimate Children—Inheritance—Smelling out of Wives—Pondo Custom.

Somabokwe asked for an order declaring Defendant Sicoto to be illegitimate and in his evidence said that he had married his great wife before 1856. Many years ago she had been smelt out and she left his kraal without male issue. After a long time she returned to him with three children of whom Defendant was the youngest. Defendant had taken possession of his great kraal and refused to allow the son of the Right Hand House to live there. Plaintiff alleged that Defendant was illegitimate and not the heir of his Great House and asked for an order declaring him to be illegitimate and also an order removing him from the position he had taken up at the Great Kraal in order that the son of the Right Hand House might be placed there. He admitted that he had paid the dowry of Sicoto because he was the child of his wife and like one of his councillors. He denied that he had ever visited the kraal where his wife was living during her separation from him.

The mother of Defendant said that Plaintiff was Defendant's father although Defendant was born at the kraal of her own people.

The Magistrate found that Plaintiff was the father of Defendant whom he acknowledged to be his own son and gave judgment for Defendant with costs.

Plaintiff appealed.

On 15 March, 1910, the Appeal Court obtained the following statement from the Pondo Assessors:—

" If my wife begets a child and it is clear that this child is not mine it can never become heir. Such a child is merely a ' Pakati '

or hanger-on. The only heirs are my own children. The husband of the woman may pay the dowry for the illegitimate child and repayment of this dowry may afterwards be made from the dowries received for the daughters of this illegitimate son. When a woman is smelt out a husband cannot recover damages, even for adultery, but the father of the woman can exact damages. It does happen that a man visits his wife after she had been smelt out but he does so stealthily and if found out he would be driven away by the people for they would say 'you were killing our daughter.' We say that under no circumstances can such an illegitimate child inherit."

The case was remitted for further evidence and on the 20 March, 1911, the Appeal Court refused to interfere with the judgment of the Magistrate on the point of Defendant's legitimacy but ordered Defendant to deliver up the Great Kraal to Plaintiff.

Umtata. 20 March, 1911. W. T. Brownlee, A.C.M.

Noniwe vs. Xotyeni.

(Ngqeleni.)

Adultery—Separate Acts—Increased Damages.

This was an action by Noniwe for eight head of cattle damages for two acts of adultery. The first act resulted in pregnancy for which he claimed five head and in regard to the second act (before birth of the child), three head. The Magistrate awarded five head only and Plaintiff appealed.

Pres.:—The Plaintiff in this case alleges that his wife was found to be pregnant and charges the Defendant with her condition and a fine was demanded, and that after this the Defendant was caught in the act of adultery with her and the point to be decided is whether under the circumstances disclosed the Plaintiff is entitled to regard the Defendant as having committed two separate and distinct torts or whether he is entitled to regard the acts of the Defendant as one continuous offence, and the case having been put to the Native Assessors they make the following statement.

"We know of cases such as this. When a man is caught and charged and a fine demanded and where a woman is found to be pregnant and the adulterer is charged and a fine demanded and

he is then again caught in adultery with the woman the cases are regarded, and will be dealt with, as separate and distinct cases."

This statement of custom is in conformity with the judgment in the case of *Buza* vs. *Gqenyu*, heard in this Court on 27 March, 1907, and in the opinion of this Court the Plaintiff is therefore entitled to bring two separate claims.

The appeal is allowed with costs and the judgment of the Court below altered to judgment for Plaintiff for seven head of cattle or value £35 and costs.

Umtata. 21 March, 1911. W. T. Brownlee, A.C.M.

Mcotshana vs. Jikumlambo.

(Libode.)

Adultery—Wife Living at Another Kraal—Presumption of Guilt Repudiation of Responsibility.

Mcotshana sued Jikumlambo for damages for adultery. It appeared from the evidence that shortly after marriage the woman in question left her husband's kraal and went to Defendant's kraal. Plaintiff found Defendant and the woman in company with others sleeping in a hut at Defendant's kraal and claimed damages for adultery but he took no *Ntlonze*. Defendant had reported the woman's presence to her father who fetched her. The woman said she was forced to marry Plaintiff but wanted to marry Defendant.

The Magistrate gave judgment for Defendant believing that no adultery had taken place and that the woman was at Defendant's kraal against his will.

Plaintiff appealed.

Pres.:—Ordinarily in a case where a married woman leaves her husband and is found living at the kraal of another man the Court hearing the case would be justified in presuming that she was there for the purposes of adultery. The onus would be upon her and upon the man at whose kraal she was found to produce the very strongest proof of innocence.

In this case the Native Assessors state that if a married woman fly to the kraal of another man and he declines to have anything to do with her and at once reports her presence to her people he clears himself and there is no case against him.

The Magistrate in the Court below is not satisfied on the evidence that there has been any adultery and this Court under all the circumstances sees no good reason for interfering with the judgment. The Defendant says that he sent to the woman's father to report her presence and judging from the fact that the woman's father was able to take Plaintiff straight to the Defendant's place it would seem that this evidence is truthful.

The woman is being forced into a marriage which is repugnant to her and she states that though she went to the kraal of the Defendant for the purpose of marrying No. 1, yet she had no intercourse with him.

The appeal is dismissed with costs.

Kokstad. 21 April, 1911. W. P. Leary, President.

Nomtwebulo vs. Ndumndum.

(Umzimkulu.)

Woman's Earnings During Subsistence of Marriage—Doctor's Fees.

Nomtwebulo and her brother as co-Plaintiff sued her husband Ndumndum for the restoration of certain cattle earned by her as a doctress during her marriage.

Defendant pleaded that such property was his by virtue of the marriage.

The Magistrate ruled on the Plea that this property belonged to the husband and Plaintiff appealed.

Pres.:—This an appeal against the ruling of the Assistant Resident Magistrate, Umzimkulu, on a point raised by the Attorney for the Defendant, as to whether Momtwebulo, even had she earned the cattle whilst living with her husband, is entitled to such cattle.

The Court ruled that in view of the judgment given in the case of *Sixakwe* vs. *Nonjoli* (Henkel page 11) the woman or her people have no right to cattle earned by her as doctor's fees during the period she lived with her husband.

The case having been put to the Native Assessors, they unanimously agree that " If a woman according to native custom makes a mat or a basket, it is her husband's property, the same as the

children. Even if she acquires a knowledge of medicine, the medicine belongs to her husband's kraal. She cannot claim cattle earned by her during the subsistence of the marriage."

The Magistrate was correct in his ruling.

The appeal is dismissed with costs.

Kokstad. 21 April, 1911. W. P. Leary, President.

Mbelingo vs. Daniel.

(Matatiele.)

Dowry—Pledging of Daughter to Meet Claim for Further Dowry.

Plaintiff Mbelingo applied for an order of custody of two children, his granddaughters, but failing in his application appealed.

Pres.:—In this case the Plaintiff asks for a declaration of rights and claims the guardianship and custody of certain two minor children—Plaintiff's grandchildren and daughters of the late Nomavi, Plaintiff's daughter.

This daughter Nomavi married according to Native custom one Daniel, who being unable to pay full dowry was sued before the Magistrate, Matatiele, in 1902. After the evidence had been heard a judgment against Daniel for payment of the dowry by instalments was entered.

Later, in 1904, an agreement was entered into between the Plaintiff and the Defendant by which Daniel (Defendant) gave up all claim to his wife, children, and dowry already paid, provided that no further claim should be made upon him or his father for the balance of the dowry still due; and it is under this agreement though not alleged in the summons, that these children are now claimed.

The judgment in 1902 and the agreement in 1904 are admitted; but the Defendant alleges that there was subsequently a further agreement, by which a girl—Dlipani—was pledged as security for the dowry of Nomavi and was duly handed to the Plaintiff. That there was this further agreement, is abundantly proved by the evidence for the Defendant. This agreement is of a nature which is frequently entered into when husbands are unable to pay the dowry demanded.

The appeal is therefore dismissed with costs.

Kokstad. 21 April, 1911. W. P. Leary, President.

Robo vs. Siqwayi.

(Mount Frere.)

Fees for Elopement or "Twala"—Apology Beast—Baca Custom.

Robo sued for the recovery of cattle said to have been paid as dowry for Defendant's daughter. Defendant pleaded that the cattle in question were fines and not dowry.

The Magistrate gave judgment for Defendant and Plaintiff appealed.

The following reasons were furnished by the Magistrate:—

I find the following facts proved:—

1. Plaintiff carried off Defendant's sister and his father declined to allow him to marry her as he was not in a position then to pay dowry.

2. Plaintiff returned the girl with a promise to pay a filly as a fine or "Twala fee" which was afterwards ratified.

3. Plaintiff carried off the girl again, and again she was returned, with a mare this time as a "Twala fee" for the same reason.

4. Some four years later he carried off the girl again and this time four head of cattle were sent as dowry.

5. Defendant refused to accept them and sent a message to his girl to return at once which she did.

6. The cattle were left at Defendant's temporarily and were taken back again by Plaintiff four days later.

7. Neither Defendant nor his sister ever agreed to marriage with Plaintiff.

It is now claimed that the two horses should be returned as they were part of the dowry. I am of opinion that they were paid as fines and as such cannot be reclaimed. That if any dowry had been paid and accepted and a marriage arranged the fines would have been merged in the dowry and in spite of the *opinion* expressed in the case *Gxonono* vs. *Skuni* (Henkel 154) that "there is no such thing as an elopement fee" fines for elopement are paid daily under Baca custom.

Pres.:—The Magistrate in his reasons for judgment has stated the case fairly. The case of *Gxonono* vs. *Skuni* (Henkel, page 154) is not on all fours with this case. There is no fee for elopement in native custom nor is there a fee for carrying (twala) a girl. There are in Native tribes and particularly amongst the Bacas forms of

proposal of marriage, in which, if the proposer is unable or unwilling to fulfil his obligations of paying the dowry asked for by the girl's people, the girl is returned with a beast. It is considered a great indignity has been suffered by her and the insult is very keenly resented.

The matter having been put to the Assessors they state: "If the girl is not entertained and the usual reception (*i.e.* the slaughter of an animal and girls asked for from her father's kraal to be with her) is not given, the animal returned with her is a fine."

In this case, the native custom of returning the girl with a beast (horse) when the father of the young man found that he was unable to pay dowry, has been observed.

The Court is satisfied that the judgment is in accordance with the Native custom and the appeal is dismissed with costs.

Kokstad 22 April, 1911. W. P. Leary, President.

Mdlovuzane vs. David and Zikali.

(Mount Frere.)

Dowry Cattle—Great and Right Hand Houses—Repayment from Eldest Daughter of Right Hand House.

David, Plaintiff, was eldest son of the Right Hand House and Mdlovuzane, eldest son of the Great House of their late father Mngandana. The dispute was as to ownership of dowry paid for Nomabese the eldest daughter of the Right Hand House. The parties were Xesibes.

The Magistrate gave judgment for Plaintiff and Defendant appealed.

In allowing the appeal the Court said:—

In this case it is not denied that the cattle paid as dowry for the second wife of the late Mngandana came from the first hut.

The case having been put to the Native Assessors they state: "The custom is that the property belongs to the eldest son when the cattle paid as dowry come from the Great House. The son of the Great House may in his goodness of heart give the son of the Second House cattle from the dowry of the first girl."

It seems therefore clear that cattle, paid as dowry for the first girl of the Second Hut, would without allotment belong to the

First Hut; and thus the Defendant would be entitled to the three oxen paid as dowry for Nomabese.

According to the Defendant he received and distributed this dowry and this statement is not contradicted.

Flagstaff. 27 April, 1911. A. H. Stanford, C.M.

Meyiwa vs. Baba.

(Bizana.)

Dowry—Marriage Dissolution—Dowry Received for Daughter Born After Dissolution of Marriage—Maintenance Expenses.

Meyiwa as heir of his father Mrwebi sued Baba, heir of Madikizela for ten head of cattle the dowry received by Defendant for a girl named Limapi. It appeared that the late Mrwebi had married the late Madikizela's daughter named Mangutyana. Shortly afterwards she left her husband pregnant with the girl Limapi who was born at Madikizela's kraal. It was contended by Defendant that Mrwebi dissolved the marriage by driving away his wife and not endeavouring to get her back and by this dissolution lost any rights he may have had to the girl Limapi.

The Magistrate held that the marriage was dissolved and the girl belonged to Defendant's kraal.

Plaintiff appealed.

Pres.:—It is not in dispute that at the time the woman Mangutyana left her husband she was pregnant, and later gave birth to the girl Limapi. Even if Mrwebi drove away his wife, which is extremely doubtful, he would not lose his right to the child, more especially as the dowry was not returned.

The woman Limapi is the daughter of Mrwebi and Appellant as his heir is entitled to succeed in his claim.

The appeal is allowed with costs and the judgment in the Magistrate's Court altered to judgment for Plaintiff for seven cattle or value as before rinderpest at three pounds each. Three being allowed for maintenance, 'Intonjane' and marriage expenses. Cattle tendered to be subject to Magistrate's approval. Defendant paying costs of suit.

Flagstaff. 27 April, 1911. A. H. Stanford, C.M.

Simama vs. Mjiba.

(Bizana.)

Inheritance—Marriage—Allocation of Wives—Pondo Custom.

Mjiba sought a declaration of rights in regard to a certain girl daughter of the late Nomtshumo.

It appeared from the evidence that the late Nomtshumo had three wives and Plaintiff was eldest son of the First, Defendant eldest son of the Second and the girl in dispute daughter of the Third. Defendant claimed the girl by virtue of his being heir of the Great House. Defendant contended that the Third wife was allotted to the Right Hand House by the late Nomtshumo.

The Magistrate gave judgment for Plaintiff on the ground that by Pondo custom as heir to the Great House he was also heir to the Third House.

Defendant appealed.

Pres.:—The case having been submitted to the Native Assessors they state that if the late Nomtshumo did place the third woman he married in the house of his Second wife he had a right to do so and in that case the girl would belong to the Third House.

The evidence of Respondent's mother given in the Kokstad gaol (without influence from either side), may be accepted as being correct. She states that "when Nomtshumo married the Third wife he placed her in the Second House and not in the First as is usually the custom. He gave as his reason for doing so that the wife of the Second House was sick."

It would therefore appear that the Appellant is the heir to the Third House of Nomtshumo.

The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for Defendant with costs.

Flagstaff. 28 April, 1911. A. H. Stanford, C.M.

Rolobile vs. Matandela.

(Tabankulu.)

Adultery—Dissolution of Marriage—Lapse of Action for Adultery —Pondo Customs.

The judgment of the Appeal Court discloses the point at issue.

Pres.:—In the year 1909 the Respondent entered an action against Appellant for adultery with his wife and recovered three cattle as damages. On the 24 February, 1910, he again sued the Appellant for three cattle as damages for adultery with his wife. In June, 1910, and before this action was decided he entered an action against the woman's brother for return of his wife or failing that restoration of his dowry and obtained judgment for the return of his wife or restoration of his dowry; by this judgment the marriage was dissolved.

The question having been submitted to the Native Assessors they state that by his action against the woman's brother resulting in the dissolution of the marriage before the claim for adultery was disposed of Respondent has lost all further right to claim for adultery, the woman now no longer being his wife. This opinion coincides with that given by the Tembu Assessors in the case of *Ndlanya* vs. *Mhashe* (N.A.C., 112) heard in the Appeal Court at Umtata on the 19th July, 1906.

The Court concurs in the view expressed by the Native Assessors.

The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for Defendant with costs.

Flagstaff. 29 April, 1911. A. H. Stanford, C.M.

Gxumisa vs. Sitaka.

(Flagstaff.)

Dowry—Part Payment on Behalf of Brother—Refund From Daughter's Dowry—Pondo Custom.

Gxumisa claimed a certain girl, daughter of Defendant, or the dowry paid for her eight head of cattle. He alleged that he was heir of his father's Great House and Defendant was the son of an *Ukungena* union between the Great wife of his late father and another man, that when Sitaka married a second wife he (Plaintiff) paid the dowry and he was therefore entitled to the dowry received for Sitaka's daughter. Defendant contended that Plaintiff paid only four head of the dowry of seven and a judgment for this number had already been given by the Headman.

The Magistrate found that Plaintiff was entitled to a refund of four only and gave judgment accordingly.

Plaintiff appealed.

Pres.:—The Magistrate has found that the Appellant paid four cattle towards the dowry of Respondent's second wife and not seven as stated by Appellant. He also finds that before the Headman Appellant did not claim Respondent's daughter but five head of cattle.

The Native Assessors having been consulted state that as Appellant paid only a portion of the dowry for Respondent's wife he is not entitled to a judgment for the Respondent's daughter and the whole dowry paid for her, and that the number of cattle awarded is sufficient.

The appeal is dismissed with costs.

Butterworth. 24 July, 1911. A. H. Stanford, C.M.

Makaza vs. Mbeki.

(Willowvale.)

Dowry Restoration—Ubulunga—Desertion of Wife on Account of Non-Payment of Ubulunga.

This was an action by Makaza for restoration of his wife or her dowry six head. In her evidence his wife said that she left Plaintiff because her guardian refused to give her an *Ubulunga* beast and she refused to return until this was done. Defendant alleged he had paid an *Ubulunga* beast and that the woman was still living with Plaintiff.

The Magistrate gave an absolution judgment and in his reasons said: "No desertion has been proved. The woman states she is willing to return to Plaintiff if Defendant gives her an *Ubulunga* beast and she actually appeared at this Court in company with Defendant."

Pres.:—The evidence for the Defence in the Magistrate's Court is permeated with falsehood. On the question of the payment of an *Ubulunga* beast Respondent says he gave Appellant's wife a small year old black heifer as an *Ubulunga* beast. His next witness describes the animal as a red and white cow, his wife as a large

black heifer. These glaring discrepancies show that an *Ubulunga* beast was never given as alleged to Appellant's wife.

The allegation that the woman has had six children or more than those she states is not borne out, one of Respondent's witnesses making the incredible statement that the woman had had four children in four years, a most unlikely thing in the case of a native woman.

The allegation that she is still living with Appellant is not borne out as Respondent's wife Nohakisi says, " for some years I have not seen her at her husband's kraal." By his refusal to give the *Ubulunga* beast Respondent is responsible for the desertion of Appellant by his wife and unless he can induce her to return by giving her the *Ubulunga* beast she demands he is liable for the restoration of the dowry less the usual deductions.

The Court finds that three children have been born during the existence of the marriage, viz; the one the husband says is his, and the two the woman has given birth to since she deserted her husband.

The appeal is allowed with costs and the judgment in the Magistrate's Court altered to judgment for Plaintiff that the Defendant shall restore his wife to him within one month from date and failing to do so restore to Plaintiff two cattle or their value £5 each and pay the costs of suit, three cattle being allowed for the three children born and one for wedding outfit. Any question as to value of cattle to be decided by the Magistrate.

Butterworth. 25 July, 1911. A. H. Stanford, C.M.

Tyomfa vs. Mbane.

(Butterworth.)

Ukuteleka Custom—Practice—Costs.

Mbane sued Tyomfa for the restoration of his wife and child or six head of cattle paid as dowry. He alleged he had married his wife about sixteen years ago; that seven years after she went to the kraal of Defendant to be doctored and has since refused to return.

Defendant pleaded the *Ukuteleka* custom (see Plea detailed in judgment). In reply to a question Plaintiff's wife stated she was

willing to return upon payment of *teleka*. Defendant stated in the Magistrate's Court that he demanded five head as *teleka*.

The Magistrate gave the following judgment:—

"That the woman and child be delivered to Plaintiff on payment by him of two head of cattle or £10. Defendant to pay costs. If cattle are tendered and any dispute as to their value arises they are to be submitted to the approval of the Resident Magistrate."

Defendant appealed.

The Magistrate's reasons were as follows:—

"The appeal in this case is said to be on the question of costs alone. The Plaintiff has succeeded in the main issue of the case, and he was compelled to come into Court in order to obtain a judgment in his favour in consequence of Defendant's admitted claim for five head of cattle under the native custom of 'Ukuteleka' which seems to me to have been exorbitant, and more than he had any right to expect.

"According to the decisions of the Supreme Court in the cases of *MacDonald* vs. *Stangu* (Cape Times Law Reports, Vol. 12, page 794), *Van Blommestein* vs. *Van der Venter* (Cape Times Law Reports, Vol. 16, page 785) and *Brink* vs. *Triggs* (Cape Times Law Reports, Vol. 19, page 935), a Plaintiff who has to come to Court to obtain a declaration of his rights is entitled to his costs though he may not obtain all he asked for and though the Defendant may succeed in reducing Plaintiff's claim. It therefore seems to me on the authority of these cases that Plaintiff in this case is entitled to costs."

Pres.:—The Defendant's plea in the Magistrate's Court was "That he has detained the Plaintiff's wife under the custom of Ukuteleka for whatever number the Magistrate may order, the balance owing at present being five head."

The Magistrate's judgment in favour of Plaintiff is a conditional one subject to his meeting the claim for the *Teleka* cattle by payment of two head of cattle, thus it would appear that the Defendant in the Court below succeeded in his contention. Clearly Respondent was not entitled to get his wife until he had paid more cattle and an absolution judgment would have been the more fitting one.

The appeal is allowed with costs; the Magistrate's judgment altered, costs being awarded to the Defendant.

Butterworth. 25 July, 1911. A. H. Stanford, C.M.

Nqwiniso vs. Sesikela.

(Idutywa.)

Kraals—Establishment of Separate Kraals—Property—Control of Great House Property—Rights and Duties of Heir Residing with Mother.

Sesikela sued his eldest son Nqwiniso for eight head of cattle the dowry received by Defendant for Plaintiff's daughter.

From the evidence it appeared that Plaintiff's wife had left him some years before and later on her son the Defendant fetched her and her daughter from her people and established a kraal away from Plaintiff where he lived with his mother and sisters. Defendant had arranged the marriage of his sister with Plaintiff's concurrence, paid the necessary wedding expenses, and received the dowry. Defendant counter-claimed for the expenses he had been put to but the Magistrate gave judgment for Plaintiff for all the cattle claimed.

Defendant appealed.

Plaintiff's wife had been allowed to intervene as co-Defendant.

In the Appeal Court the Native Assessors made the following statement:—"The father was a consenting party to his wife living at his son's kraal, practically it is his kraal as he says he visits her there and the cattle paid for her daughter's dowry should remain there for her support, but are still the property of the husband—but he may remove some of the cattle for his own support and need. The Appellant is heir to this house of his father's, he is not in the position of a stranger who is put in, the girl is a sister of his own house and it is right that he should support her and provide for her wedding and then cannot claim against his father for such assistance."

Pres.:—The evidence discloses that the Respondent's wife was fetched by his son from her brother Sijako many years ago and has lived with his son ever since with his full knowledge and consent and it is not reasonable for him now to insist on her returning to the kraal he is living at. Further the Court does not believe this to be a genuine desire but merely a subterfuge to evade making proper provision for this wife.

The appeal is allowed with costs. The Court directs that the dowry shall remain at the kraal of the Appellants for the use of

the second Appellant but Respondent may remove four of the animals to the kraal he personally occupies for his own use. Should any dispute arise as to which of the animals are to be removed the Magistrate will decide having due regard to the woman's needs.

Butterworth. 25 July, 1911. A. H. Stanford, C.M.

Nunu vs. Fene.

(Idutywa.)

Estates—Heir's Liability for Estate's Debts—Dowry Cases.

Fene sued Nunu for £10 which he alleged he had lent to Defendant's father who had died without repaying the amount. Defendant denied knowledge of the debt and said there was no property in the Estate.

The Magistrate gave judgment for Plaintiff for £10 and Defendant appealed.

Pres.:—The extent to which a native heir to an estate is liable for the debts contracted by his predecessor was determined at a sitting of the Native Appeal Court at Kokstad in the case of *Sidona* vs. *Kagiwa* in 1906 when it was ruled that such person was liable in his capacity as heir and his liability only extended in so far as the estate could meet it. This Court sees no reason to depart from this principle it being understood that no alteration is made as to the custom and procedure followed in dowry cases.

The judgment in the Magistrate's Court will be amended to the effect that execution shall proceed only against assets in the estate of the late Nunu.

No order will be made as to costs of suit.

Butterworth. 26 July, 1911. A. H. Stanford, C.M.

Zondani vs. Dayman.

(Nqamakwe.)

Inheritance—Great and Right Hand Houses—Institution of Heir to Right Hand House—Native Procedure.

The late Sifile had two wives. In the Right Hand House he had several sons, amongst them Plaintiff Zondani (the eldest), and the

late Magamle (the second). In the Right House there was no male issue. Defendant was heir of Magamle. At Sifile's death the Right Hand House possessed certain sheep. Plaintiff Zondani alleged that as heir of the Great House and in default of male issue in the Right Hand House he was heir of that House. He stated that the widow of this House, with his consent, had lent Defendant some of the sheep and now that they were required back Defendant refused to give them up and Plaintiff accordingly sued for them.

The defence was that Defendant was heir to the Right Hand House because the late Sifile had instituted the late Magamle as heir and Defendant was Magamle's eldest son.

On the evidence the Magistrate found that the late Magamle was installed as heir of the Right Hand House and that therefore Defendant succeeded to the property.

Plaintiff appealed.

Pres.:—Under ordinary circumstances there being no male issue in Sifile's Right Hand House Zondani as the eldest son of the Great House would be the heir.

To succeed in the defence put forward in the Defendant's plea it was necessary for him to prove the assertion that Sifile placed Magamle, the second son of his Great House as heir to the Right Hand House. This Respondent has entirely failed to do.

The placing of an heir by the head of a family in a house which has no male issue is an act of much formality. The relatives even of a distant degree and neighbours are assembled and a formal declaration made, the chief of the tribe being notified. The Respondent has failed to prove that any such meeting was held and the evidence of Nyanti, Sifile's Right Hand wife and of her daughters, the persons who would have had the greatest interest in such a transaction, to whom a son and a brother would be given by it, shows conclusively that no such arrangement was made, and there is no reason to discredit their evidence with regard to it.

The Court attaches no importance to the evidence of the Sheep Inspector. These officers do not enquire into ownership but register the flock in the name of the person in charge although the sheep may belong to various owners. Nor has the distribution of the lands on survey any weight as the Appellant Zondani was living in another location where he and his sons no doubt had their allotments.

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Plaintiff for the forty sheep of the Right

Hand House admitted by Respondent to be in his possession and absolution from the instance regarding the balance of the claim, Defendant paying costs of suit.

Butterworth. 26 July, 1911. A. H. Stanford, C.M.

Makeleni vs. Matadi.

(Nqamakwe.)

Adultery—Payment of Cattle by Adulterer to Guardian—Seduction by Adulterer Prior to Marriage—Father's Claim for Previous Tort.

Makeleni had obtained a judgment against Lutshongo for damages for adultery with his wife Hlazeka, daughter of Kobese. Under a writ two cattle at the kraal of her father were seized for the damages, and in the interpleader suit with regard to these cattle the Magistrate held them to be not executable. The Magistrate gave the following reasons:—"It appears that Lutshonga seduced Hlazeka some years ago, and had two children by her. He paid no fine or dowry. While he was away Makeleni *twalaed* her and paid two head of cattle. On Lutshonga's return she changed her affections and returned to him. Lutshonga then, with the intention of making her his wife, paid the two head of cattle which form the subject of this case. Makeleni then sued Lutshonga for committing adultery with his wife, and obtained judgment.

"I am of opinion that Lutshonga paid the cattle as dowry while Hlazeka, *alias* Nomanti, was the wife of Makeleni, but that Kobese or his heir had at that time the right of a fine, and that as the cattle were paid to him *bona fide*, he has a right in them against Lutshonga or Makeleni; that they cannot be considered as the property of Lutshonga and liable for his debts, and therefore are not executable under the writ."

In the Appeal Court the case was submitted to the Native Assessors, who made the following statement:—

"The woman became twice pregnant by a certain man, Lutshonga, who paid no fine nor did he marry her. He went away to work. Makeleni carried off the woman; the father sent for her, but accepted two cattle, leaving the woman with this man,

by whom she had a child. It is clear the woman was married to this man. Later Lutshonga returned, and the woman left her husband and went to him, who then paid two cattle to the father, who now says he is taking these for the pregnancies caused by Lutshonga. We say he cannot do this. He has given the woman in marriage to Makeleni, and cannot revive his claim for damages, and Makeleni has a right to attach these cattle for the adultery."

Pres.:—Under Native custom when a married woman elopes with a man and the adulterer pays cattle to the father or guardian, with the object of marrying her, it is held that the husband is entitled to recover such cattle.

In the present case the woman was given in marriage to Appellant. She has left him and gone to live with her first lover, who has now paid to her guardian two cattle with the object of marrying. It is not competent for the guardian, receiving cattle under such circumstances, to appropriate them as a set-off against a previous tort committed by the adulterer.

The appeal is allowed with costs, and the judgment in the Magistrate's Court altered to a judgment declaring the cattle attached to be executable with costs.

Butterworth. 26 July, 1911. A. H. Stanford, C.M.

Ladodana vs. Ntlanganiso.

(Kentani.)

Adopted Sons—Payment of Dowry—Refund from Daughter's Dowry.

Ladodana sued for certain stock which he said he had contributed to the dowry of Defendant, on condition that Defendant and his wife were to live at his (Plaintiff's) kraal and work under him. He contended that Defendant had violated this condition by living elsewhere, and was therefore liable to return the stock.

Defendant denied the conditions alleged, and pleaded that he was adopted by Plaintiff and worked for him for many years without consideration. He admitted the contribution made by Plaintiff, but said this was only in accordance with Native custom.

The Magistrate gave absolution, and Plaintiff appealed.

Pres.:—The transaction as detailed by Appellant is decidedly contrary to the usual custom observed amongst Natives in such cases. Respondent was an inmate of Appellant's kraal for many years from boyhood, and was treated in the light of an adopted son, and in giving assistance for Respondent's marriage in the ordinary course Appellant would look to be reimbursed on the marriage of Respondent's eldest daughter.

No doubt the removal of Respondent from his kraal has incensed Appellant, and causing him to demand the return of the benefits he has conferred upon Respondent, but at present he is not entitled to succeed.

The appeal is dismissed with costs.

Butterworth. 26 July, 1911. A. H. Stanford, C.M.

Sobekwa vs. Mntuyedwa.

(Tsomo.)

Kraal Head Responsibility—Nonjoinder—Practice.

In an action for damages for trespass Mntuyedwa sued Sobekwa, as head of the kraal and thus responsible for its inmates, for the torts of Defendant's younger brother, whom he alleged was responsible for the trespass.

An exception of nonjoinder, in that the tort feasor should have been joined in the summons, was successfully taken, and Plaintiff appealed.

Pres.:—The liability of the head of a kraal for a tort committed by a member of his kraal is a liability contingent upon proof of the tort in an action against the tort feasor, in which action the person upon whom as head of the kraal responsibility is sought to be placed must be joined in the summons.

In some of the earlier cases before the Appeal Court this was not always insisted upon, but in order to secure uniform practice, and also to enable each of the parties to defend the action, in later cases it was decided that both the alleged tort feasor and the head of the kraal must be joined in the summons, and this ruling must apply in the present case.

The appeal is dismissed with costs.

Butterworth. 26 July, 1911. A. H. Stanford, C.M.

Tshangana vs. Tshangana.

(Tsomo.)

Marriage Outfits—Recovery of Costs—Duties of Head of Family—Marriage in Absence of Guardian—Privity of Contract.

Mpambani Tshangana, a Headman, sued Ngesman Tshangana for £27 4s. 3d., expenditure incurred by him in providing the wedding outfit of a girl named Evelina, Defendant's sister. Mpambani was eldest son of the Great House of their late father and head of the Tshangana family, and Defendant was heir of the Qadi House, and Evelina Defendant's sister in the same House.

Plaintiff alleged that during Defendant's absence at work, and at the request of the family, he gave the girl Evelina in marriage, received the dowry and provided wedding outfit to the extent named. On Defendant's return he handed over the dowry, but Defendant refused to refund the expenditure incurred by Plaintiff.

Defendant stated he was not a consenting party to the marriage, although he was to the engagement. He denied liability, on the ground that there was no privity of contract between the parties. Plaintiff having no right to proceed with the marriage and incur the expenditure without Defendant's consent.

The Magistrate absolved Defendant, and Plaintiff appealed.

Pres.:—The engagement to marry had been entered into and consented to by Respondent before he left for German West-Africa. During his absence the intended husband pressed for marriage, and acting on the request of Respondent's mother, wife, and younger brother, the Appellant, as head of the family and in full accordance with Native custom, provided the wedding outfit, which is a legitimate claim against the dowry. The expenditure incurred is not excessive in view of the rank and status of the parties.

Respondent states that he wrote to stop the wedding, but this is not borne out by the letter of the 8th November, 1907, in the posteript of which he practically authorises the Appellant to demand dowry and proceed with the wedding.

The outfit and entertainment were necessities which the Respondent would have had to supply had he been there, and he himself says had he been there he would have had a "swell" wedding.

This Court is of opinion that Appellant is entitled to recover the expenditure he incurred on Respondent's behalf, but from which the sum of £6 he received as dowry and did not account for must be deducted.

The appeal is allowed with costs, and judgment in the Magistrate's Court altered to judgment for Plaintiff for £21 4s. 3d. with costs of suit.

Umtata. 31 July, 1911. A. H. Stanford, C.M.

Mdodana and Another vs. Nokulela.

(Ngqeleni.)

Assault—Kraal Head Responsibility—Practice—Joining of Claims Under Native and Colonial Law.

Nokulela sued Mdodana and Sicoto, the latter as head of the kraal, for three head of cattle as damages for adultery, and for £25 as damages for assault. He obtained judgment for three head for the adultery and £15 for the assault, and Defendants appealed.

Pres.:—The summons contains two claims for damages, the first for adultery; the marriage being according to Native custom it could only be heard under Native law.

The second for damages for assault, which can only be dealt with under Colonial law, there being no right of action under Native custom for such a claim.

The Magistrate was wrong in holding the second Appellant, as head of the kraal, liable for the damages awarded against the first Appellant for the assault; the appeal must succeed on this point, with costs in favour of the second Appellant, the Magistrate's judgment, in so far as the damages for the assault are concerned, to be altered to relieve the second Appellant from any liability.

The appeal, in so far as the first Appellant is concerned, is dismissed with costs against himself only. The Court expresses the opinion that it is not desirable that claims which have to be dealt with separately under both Native custom and Colonial law should be joined in one summons, unless the claims are separated and the law under which each is brought specifically stated.

Umtata. 3 August, 1911. A. H. Stanford, C.M.

Mhlangaba vs. Dyalvani.

(Mqanduli.)

Adultery—Desertion of Wife—Refusal to Disclose Adulterer—Liability of Father.

Mhlangaba sued Dyalvani for fifteen head of cattle as damages for adultery. He said his wife had deserted him and returned to the kraal of Defendant, her father, where she was wrongfully detained, that while living at Defendant's kraal she became pregnant, that both his wife and Defendant refused to disclose the name of the adulterer, and on these grounds he sought to make Defendant liable. He claimed the greater amount of damages because he said he was of royal blood.

Defendant in his plea admitted the allegation of pregnancy, but denied wrongful detention. The evidence showed the woman in question was not detained under the custom of ukuteleka, and Defendant was willing that she should return to her husband, and in fact had tried to induce her to return, but she refused.

The Magistrate gave judgment for Defendant, and in his reasons said:—"I have consulted several Native Chiefs, who are thoroughly conversant with Native custom, and they are unanimously of opinion that under the circumstances disclosed in this case the Defendant would not be liable. It therefore seems clear that the Plaintiff has no right of action against the woman's father for the damages claimed. It is open for him to sue for the return of his wife, and failing her, his dowry cattle. Nonqwara being a married woman, and having attained her majority, is freed from all paternal control, and is under the marital power, protection and guardianship of her husband alone. She has, as will be seen in paragraph 2 of Plaintiff's summons, been away from him for five years, and his neglect of her is such as to practically amount to a rejection of his wife. In the case *Mqwashu* vs. *Mesana* (N.A.C. 15) the principle of contributory negligence is recognised. I was fully satisfied that the Defendant did not in any way wrongfully and unlawfully detain Plaintiff's wife, and as he had not telekaed her, he cannot be held in any way responsible for her pregnancy. The decision in the case of *Ndabeni Mtanca* vs. *Mangunza*, decided by the Appeal Court in July, 1910

(not yet reported), does not apply. The facts are against Plaintiff's allegation, and I am of opinion that according to Native custom he cannot succeed in the present action."

Plaintiff appealed.

Pres.:—This is an action by the husband to make the father of his wife responsible for the amount of damages usually awarded against an adulterer when pregnancy has resulted from adulterous intercourse, on the ground that the wife and father refuse to disclose the name of the adulterer. No such action lies under Native law and custom.

The refusal to disclose the adulterer is in itself practically a rejection of the husband, and he is entitled in such circumstances to sue for the dissolution of the marriage and for the return of his dowry.

The appeal is dismissed with costs.

Umtata. 3 August, 1911. A. H. Stanford, C.M.

Ndungane vs. Jessie Nxiweni.

(Cala.)

Seduction—Breach of Promise of Marriage—Civilised Natives—Colonial Law.

Jessie Nxiweni sued Defendant for £75 as damages for seduction and breach of promise of marriage.

The Magistrate awarded £35, and Defendant appealed.

Pres.:—The parties to the suit are educated Natives, professing Christianity. The Magistrate rightly dealt with the suit under Colonial law.

The seduction and promise of marriage have been clearly proved, and the Appellant has now put it out of his power to fulfil his promise by marrying another woman.

The Respondent held a good position as a teacher in a school, which position she lost, and she will in future be prejudiced in following her profession as a teacher. The damages awarded, under such circumstances, are by no means excessive.

The appeal is dismissed with costs.

Umtata. 3 August, 1911. A. H. Stanford, C.M

Mhlanganiso vs. Mhlanganyelwa.

(Qumbu.)

Marriage Dissolution — Smelling Out — Widows — Illegitimate Children—Ownership.

Mhlanganyelwa, heir of the late Siquku, sued Mhlanganiso for a declaration of rights in regard to two illegitimate children, daughters of his father's widow named Salaze.

He alleged in his summons that after his father's death the woman Salaze gave birth to two illegitimate girls, one of whom was now married and dowry had been received for her by Defendant. Plaintiff claimed this dowry and guardianship of the other girl. The dowry paid for Salaze by Siquku had not been returned.

The defence was that the girls were not illegitimate, being born of a marriage entered into between Defendant and Salaze after the death of Siquku.

Salaze, in her evidence, stated she was smelt out by Siquku, and she had never returned to his kraal.

The Magistrate found that the two children were born before any marriage took place between Salaze and Defendant and before the marriage with Siquku had been dissolved. He awarded the children claimed to Plaintiff.

Defendant appealed.

Pres. :—There is a strong conflict of evidence in this case, but there are certain points which are of assistance in coming to a decision.

Appellant's wife, now called Salaze, was first married to Siquku. She says she left him because she was smelt out and driven away, her statement that she was smelt out is strongly supported by the fact that Siquku made no effort to get her back and by the fact that the child of whom she was pregnant at the time, the Respondent, has been allowed to grow up with his mother's people.

It is admitted that the children claimed were born after Siquku's death, and under native custom no damages are payable for causing the pregnancy of widows. Appellant says that Salaze was given in marriage to him by her eldest brother Kohlela, to whom he paid dowry, and Kohlela confirms this. Respondent's chief witness, Maqebengwana (younger brother of Kohlela) also admits the marriage. Some doubt exists whether this took place before or

after the birth of the girl Nomakoboka, but if Maqebengwana's evidence is correct it shows that in consideration of the payment made to him he handed over his sister together with the children to Appellant. A further witness for the defence says that Appellant paid one beast for the birth of each of the first three children Salaze had by Appellant, therefore, having paid for the children he would be entitled to them.

The Magistrate appears to have been influenced in his Judgment by the belief that because Siquku's cattle had not been returned his marriage was not dissolved; in this he is in error as death dissolved that marriage even if Siquku had not already done so by smelling out and driving away his wife.

For the reasons given the appeal is allowed, with costs, and judgment in the Magistrate's Court altered to judgment for Defendant, with costs.

Umtata. 4 August, 1911. W. T. Brownlee, A.C.M.

Nohani vs. Bonase.

(Engcobo.)

Widows—Rights of Action—Estate Property.

This was an appeal from the ruling of the Assistant Magistrate of Engcobo. The Plaintiff, Nohani, brought Defendant, Bonase, into Court: "To show why he hath not restored to Nohani, widow, of Mqikela's ward in this district (hereinafter styled the Plaintiff) five head of cattle, or paid their value, £37 10s. 0d., and paid £10 as damages to Plaintiff, and thereupon the Plaintiff complains and says: —

1. That the Defendant has possessed himself of five head of cattle of the value of £37 10s. 0d., or thereabouts, which he unjustly detains from the said Plaintiff.
2. That Plaintiff has demanded restoration of the five head of cattle or payment of their value, £37 10s. 0d., but Defendant refuses to comply with Plaintiff's demand. Wherefore Plaintiff prays that Defendant may be adjudged to restore the said five head of cattle, or pay their value, with costs of suit."

Defendant pleaded specially as follows:—

"1. That the cattle in question belong to the estate of Plaintiff's deceased husband Natu.
2. That Plaintiff was married to Natu according to Native law and custom.
3. That Natu has a son and heir who is the proper person to maintain this action.
4. That the Plaintiff has no *locus standi* to maintain this action.
   (*a*) Because she is living with her own people and not at the kraal of any of her husband's relations.
   (*b*) Because the stock in question was not earned by the labour of Plaintiff, but forms portion of her late husband's estate.

Wherefore Defendant prays that the said Plaintiff's summons may be dismissed, with costs."

Plaintiff made the following replication:—

"1. As to para. 1 of Defendant's pleas Plaintiff says the cattle in question were paid as dowry for Natu's daughters about the year 1902 to Plaintiff after Natu's death, the said Natu being Plaintiff's husband, and the said daughters being issue of Natu's marriage with Plaintiff.
2. Plaintiff admits plea 2.
3. As to para 3, Plaintiff admits that Natu has a son and heir, namely, one Vububi, who is a minor of about seventeen years of age, who is in the care of his mother the Plaintiff, and has been ever since his father's death.
4. As to para. 4, Plaintiff denies that she has no *locus standi*, she admits that she is living with her own people, but she is doing so only to be near this Court for the hearing of this cause; she admits the cattle in question were not earned by her but were obtained as set forth in para. 1 hereof.
5. Plaintiff says that the cattle in question have been in her possession, or under her control ever since they were received by her as hereinbefore set forth. Wherefore the Plaintiff again prays for Judgment, with costs."

The Magistrate sustained the plea and dismissed the Summons, giving the following reasons: —

" Plaintiff sues in her capacity as widow of the late Natu. It is admitted that her late husband has an heir Vububi by name (Clause 3 of Replication) also that the cattle claimed are estate cattle (Clause 1) and not cattle earned by her herself (Clause 4). This being so the action should be brought by the heir of Natu, assisted by the legal and proper guardian, in so far as needs be, *vide* ruling in case of *Nosentyi* vs. *Makonza*, Henkel's Reports, page 37."

Plaintiff appealed.

Pres.: —In this case the Plaintiff, who describes herself as a widow, complains that the Defendant has dispossessed her of certain cattle which she says were in her lawful custody, and she claims their return to her. The Defendant pleads specially that Natu, the late husband of the Plaintiff, left an heir, and that this heir is the proper person to sue, and also that the Plaintiff has no *locus standi*, (*a*) because she is living with her own people and not at the kraal of her husband's relatives, and (*b*) because the stock in question was not earned by the Plaintiff but forms portion of her late husband's estate.

The Plaintiff, in her reply, admits that her late husband left an heir, a boy named Vububi, who is now in her charge, and states that the cattle in question were paid to her as dowry for her daughters subsequent to the death of her husband and have been in her lawful possession ever since they were paid.

The Magistrate in the Court below has, without taking any evidence, sustained the special plea, and has dismissed the Plaintiff's summons, holding that this action should be brought by Natu's heir, Vububi.

This Court has repeatedly laid it down that a widow has, under certain circumstances, the right of action.

In the case of *Nosentyi* vs. *Makonza* (Henkel, p. 37) it is laid down that every native woman has a right of action, unassisted, against the guardian in her husband's estate to protect herself and her children and property from improper administration, and that in an action to recover from a person not a guardian, should it be shown that the guardian unreasonably refuses to assist, the woman can proceed with the suit.

In the case of *Magwaxaza* vs. *Nomkazana* (Henkel, p. 66), which is very similar to the case now before the Court; the Plain-

tiff, a widow, was allowed to establish a separate kraal for herself, and when the Defendant, her guardian, wished to prevent her removing the stock belonging to her house to this separate kraal this Court sustained the judgment of the Court of Ngqeleni, which was in favour of the Plaintiff.

In the case of *Nosenti* vs. *Sotewu* (Henkel, p. 117), the Plaintiff stated that she was the widow of Mpiyana in his Right Hand House, the heir of which, a lad named Tubeni, was still a minor, and that Defendant, the son of Mpiyana, in his Great House had wrongfully and unlawfully possessed himself of certain twenty-six head of cattle, the property of the Right Hand House. An exception similar to the one now raised as a special plea was dismissed by the Magistrate, and his ruling was upheld on appeal. And when the Magistrate in the Court of Willowvale ultimately gave judgment for the Plaintiff, this Court sustained the judgment of the Court below and dismissed the Defendant's appeal.

In the case of *Manyosine* vs. *Nonkanyezi* (Henkel, p. 114), where the Plaintiff was the guardian of Pike, the heir of the late Lamla, and in that capacity sued Defendant, the widow of the late Qazela for certain property which he alleged had been appropriated by her, and which she contended was the property of the house of Qazela, the heir of which was the eldest son of her "unkungena" union with Zweni, this Court, in deciding that the property in the estate of Qazela devolved on the heir of the late Lamla, Pike, who was declared to be the heir of such property, yet ordered that that property should still remain in the house of the Appellant, Manyosine, so long as she did not make an improper use of it.

In the case of *Noseyi* vs. *Siyo Gobozana* (Henkel, p. 214) it was decided that a widow has a life interest in the property of her husband appertaining to her house, and also that should disagreement arise between her and her late husband's friends she may have a place appointed for her where she may live.

It thus is quite clear that a widow has certain personal interests in the property of her late husband, and also has the right to maintain the interests of her children in this property, and in either case she is entitled to be heard.

It is unfortunate that the summons in this case is very incomplete and inartistically drawn, and had the Defendant raised objections to it in the Court below it might have been amended in

the direction of describing more accurately the particular grounds on which the Plaintiff brings this action, whether on the ground of her own life interest in it, or in the interest of her son, Vububi. The Defendant, however, did not raise any objection, but pleaded to the summons as it stood. He has failed in his pleas to disclose his own status, but has sought by means of a special plea to sweep the Plaintiff out of Court on the ground that she has no *locus standi*.

He has not proved his special plea, and before it was sustained it is necessary that he should have done so.

The appeal is allowed, and the ruling on the special plea set aside, and the case remitted to the Court below to be gone into upon its merits. Costs of the appeal to abide the issue.

The Magisterial assessors (Messrs. T. W. C. Norton and W. T. Welsh) dissented. Mr. Norton gave the following reaons:--

Appellant's Attorney, in argument before this Court urges that this is a question of spoliation, but there is no allegation to this effect in the summons, nor, according to the record, was such a question raised in the Court below.

Plaintiff sues in her own name, no capacity whatsoever being alleged.

Defendant pleaded specially that Plaintiff has no *locus standi* inasmuch as the stock sued for forms part of the estate of her late husband, Natu, and that his heir, a minor, Vububi, is alive.

Plaintiff, in her replication, admits both these allegations.

Instead of applying for an amendment of the summons to insert the capacity in which she might have sued,—and such an application might quite properly have been granted, particularly if, as seems possible, Defendant is the guardian in the late Natu's estate,—Plaintiff chooses to appeal.

In the case of *Nosentyi* vs. *Makonza* (Henkel, p. 37) it is laid down that a woman may sue her guardian, but in the present case it is not disclosed if Defendant is her guardian.

As plaintiff sues personally for property which she admits belongs to the heir of Natu's estate she must fail.

I am of opinion that this appeal should be dismissed, with costs.

Mr. Welsh concurred.

Umtata. 8 August, 1911. W. T. Brownlee, A.C.M.

Ngabom vs. Maswili.

(St. Mark's.)

Adultery—Ntlonze—Women Quarrelling as Catch—Intermediaries.

Maswili sued Ngabom for the three head of cattle as damages for adultery. The Magistrate gave judgment for Plaintiff and Defendant appealed.

Pres.:—In this case there has been no catch, and the Plaintiff relies upon the fact that there has been a quarrel between Defendant's wife and his wife, and holds that this is a sufficient catch. It is necessary, however, to show, before the quarrel can be regarded as a catch, that it was actuated by jealousy on the part of Defendant's wife and the outcome of infidelity on the part of the Defendant himself with plaintiff's wife and this, in the opinion of this Court, the Plaintiff has failed to do.

The Plaintiff has produced witnesses to prove improper intimacy between Defendant and Plaintiff's wife, but the witness who gives evidence of this makes the astounding statement that it was the Defendant's wife herself who was the intermediary between Defendant and Plaintiff's wife in the preliminaries to this alleged intimacy. Such a statement cannot be accepted and throws discredit on the whole of this evidence.

The appeal is allowed, with costs, and the judgment of the Court below altered to judgment of absolution from the instance, with costs.

Umtata. 8 August, 1911. W. T. Brownlee, A.C.M.

Pantshwa vs. Msi.

(St. Mark's.)

Dowry Restoration—Engagements to Marry—Marriage by Christian Rites—Immorality on part of Man.

Pantshwa sued Msi for the restoration of seven head of cattle which he stated he had paid in 1907 and 1909 to Defendant on account of a marriage to be contracted between himself and Defendant's daughter, Ida. He further alleged that the girl Ida

now refused to carry out her engagement, and she had, moreover, been guilty of immoral conduct and had become pregnant.

Defendant admitted payment of dowry and of the engagement, but pleaded that the marriage was to be celebrated according to Christian rites, and that his daughter broke off the engagement because of Plaintiff's immoral conduct with another woman. Defendant also admitted that his daughter had given birth to a child, but said she was seduced long after the engagement was cancelled.

On the plea Plaintiff asked for judgment quoting the case of *Fetana* vs. *Sinukela*, N.A.C. 22. In reply Plaintiff quoted *Nojiwa* vs. *Vuba*, N.A.C. 57 and *Hebe* vs. *Mdindwa Mba*, 12 E.D.C., p. 6.

After evidence the Magistrate gave judgment for Plaintiff for five head of cattle, with costs, and gave the following reasons:—

In this case both parties have appealed against my judgment which might briefly be stated to have been based upon my opinion that from the evidence it is clear that both sides may be saddled with blame for not bringing about the marriage or for causing a breaking off of the engagement between William and Ida.

Defendant admits receiving seven cattle. Three calves have since been born. I am of opinion that the cattle should be equally divided between the parties, but that as Defendant has at no time made an offer to return any of them he should pay costs.

Pres.:—The point to be decided in this case is whether the engagement to marry was broken off by the Plaintiff or by the girl Ida, or by the Defendant, and it seems to be quite clear from the evidence of Ida herself and of her mother, that it was she who broke off the engagement, and not the Plaintiff, and that the letter of demand issued by Mr. Milner in April, 1908, was written after the Plaintiff had been told by Ida that she would have nothing more to do with him.

She says in her evidence that she told Plaintiff that she was finished with him because of his relations with Elizabeth Peter. She also says that she rejected him because of what had taken place at Joseph's place, and that she told her mother of this.

She further says that it was she and not her father who broke off the engagement, and that she told her father in February, 1908, that she had rejected Plaintiff. In these statements she is supported by her mother.

It then becomes necessary to consider whether Ida had sufficient grounds for the breach of the engagement, and whether the De-

fendant has sufficient grounds for retaining the dowry paid by the Plaintiff.

In the opinion of this Court it seems that if the reasons alleged by Ida are the true reasons that actuated her conduct, she had ample reason, from a moral standpoint, for rejecting the Plaintiff. It seems, however, that the matter of dowry must be regarded from quite a different standpoint from that which a contemplated Christian marriage must be regarded, as the two have nothing in common; the latter having nothing to do with Native Law and Custom, and the former being certainly a matter of Native Custom, and, therefore, is a matter to be dealt with under Native custom.

In the case of *Fetana* vs. *Sinukela* (Henkel, p. 22) it was laid down that immorality on the part of a man cannot be regarded as a legitimate reason for breaking off or postponing a marriage and retaining dowry paid.

The appeal is allowed, with costs, and the judgment of the Court below is altered to judgment for Plaintiff, as prayed, with costs.

The cross appeal is dismissed with costs.

Umtata. 9 August, 1911. W. T. Brownlee, A.C.M.

Menziwa vs. Mbondi.

(St. Mark's.)

Isondlo Custom.

Menziwa sued Mbondi for certain dowry cattle and for the delivery of a child. He alleged that he was the heir of his late father, Ngca, who had paid dowry to Defendant for his wife, that this woman returned to her people after the death of Ngca, and there gave birth to a girl. Defendant had received another dowry for the widow, and Plaintiff now sued for the original dowry paid by the late Ngca and for the girl born of the marriage.

Defendant denied a second marriage, but tendered delivery of the girl on payment of an "isondlo" beast.

The Magistrate gave an absolution judgment for the dowry, and ordered the child to be delivered upon payment of a maintenance beast.

Plaintiff appealed.

Pres.:—In this case the appeal is upon the question of "isondlo," and the Native Assessors state that "isondlo" is to be paid for the child even should the woman have gone without her husband's people's consent to her father, and that there is no difference whether the child were born at the woman's husband's place or at her father's place.

The Magistrate in the Court below is satisfied that Defendant has maintained the child in question, and has ordered the payment of "isondlo," and this Court sees no reason to interfere with the decision.

The appeal is dismissed with costs.

Umtata. 10 August, 1911. W. T. Brownlee, A.C.M.

Zondani vs. Domkracht and Others.

(St. Mark's.)

Location Responsibility—Erection of School—Public Meetings—Liability of Persons Attending for Contribution Levied.

This was an action by Headman Domkracht and others, describing themselves as "The Building Committee of the Mtingwevu School Building," in which they sued Zondani for ten shillings, being his contribution as head of his kraal towards the erection of the Mtingwevu School. Plaintiffs alleged that at a public meeting they were elected as a Committee to complete the arrangements for building a school in the location, and at meetings at which Defendant was present contributions of six shillings and four shillings were levied on heads of kraals in the location to cover the cost of erection of the school in question. They stated that Defendant was present at the meetings, and raised no objection to the levy, and therefore, according to Native custom, he bound himself to payment of the amount levied at the meetings.

The Magistrate gave judgment as prayed, and Defendant appealed.

Pres.:—In this case it seems to be quite clear that the Plaintiffs have the right to sue. They allege that they are the members of a Committee appointed for the purpose of seeing to the erection of a certain school building in the Mtingwevu Location. There

is evidence to show that such a Committee was appointed, and that they are its members, and this is not attempted to be denied by the defence.

It is argued on appeal that without any special mandate to sue the Plaintiffs cannot raise this action, but it seems to this Court, after reference to the following authorities (*Maasdorp*, Book 3, pages 55 and 279; *Nathan*, Book 4, articles 2,124 and 2,125), not only that the Plaintiffs are entitled to sue as a Committee, but also that the liability of the Defendant may be inferred from his conduct. The Magistrate in the Court below has held upon the evidence that the Defendant agreed to pay the sums claimed, and with this finding this Court sees no reason to disagree.

This Court is further of opinion that even had this case been tried under Native custom the Defendant would be liable. In a case tried in the Qumbu district, in which Headman Xotongo sued in his capacity as Headman certain residents of his location for sums alleged to have been promised by them at a public meeting for the erection of a school, the Chief Magistrate, Mr. W. E. Stanford, held, on appeal, that if it could be shown that the Defendants attended the meeting at which it was agreed to erect the school building, and that they did not dissent, they must be held to have consented, and must be held liable.

The appeal is dismissed with costs.

Umtata. 10 August, 1911. W. T. Brownlee, A.C.M.

Pili vs. Mguli.

(St. Mark's.)

Adultery—Ntlonze—Gifts.

Mguli sued for the usual damages for adultery. He based his claim on a gift of beads by his wife to Defendant while he (Plaintiff) was away at work.

There was no actual catch, but the Magistrate finding the act had been committed, gave judgment as prayed, and Defendant appealed.

Pres.:—In this case there has been not the usual catch, and there is no material proof produced, but the Plaintiff relies upon an alleged gift of beads (necklaces) to the Defendant by his wife as the incident upon which he bases his action; and this matter

being put to the Native Assessors, they state that a gift made under circumstances such as those disclosed in this case constitutes a catch.

This Court has always held that in the absence of material proof the Court must demand the strongest possible proof of guilt, and in this case the Magistrate in the Court below has no doubt upon the evidence that improper intimacy has taken place between the Defendant and the Plaintiff's wife, and has given judgment for the Plaintiff.

There is ample evidence to support the finding of the Court below, and this Court cannot say that the Magistrate has erred in believing it.

The appeal is dismissed with costs.

Umtata. 11 August, 1911. W. T. Brownlee, A.C.M.

Rosie Peter vs. Mkwane.

(Engcobo.)

Estates—Marriages in Community—Marriages Before Annexation —Widow's Rights.

Rosie Peter sued Defendant for certain property in the estate of her late husband, Isaac Peter, which she alleged Defendant had appropriated to his own use.

Defendant pleaded that he was the heir of the late Isaac Peter, and was therefore entitled to the property. He admitted the marriage in community, but contended Plaintiff had no *locus standi*, as she was not appointed executrix.

In reply to the plea, Plaintiff said that as she was married in community of property to her husband, who died in 1906, the action must be brought under Colonial law, and that by virtue of this community she was entitled as surviving spouse to the control of the estate until the appointment of an executor.

The Court directed that steps be taken for the appointment of an executor, and dismissed the summons.

Plaintiff appealed.

Pres.:—In this case there are various points to be cleared up before it can be satisfactorily decided. The Plaintiff describes herself as the widow of the late Isaac Peter, and in her replica-

tion says that she was married in community. It depends entirely, however, upon the date of her marriage with Isaac Peter whether such marriage would rank as a marriage in community or as a Native Marriage. In the case of *Sekeleni* vs. *Sekeleni* (S.C. Reports, vol. 21, p. 118) it was laid down by the Supreme Court that no marriage contracted in East Griqualand prior to the Proclamation announcing the annexation of that territory to the Colony would have any other effect than that of a Native marriage, and, applying the principles of that decision here, no marriage in Tembuland prior to 20th August, 1885, would have any other effect than that of an ordinary Native marriage.

The point then of the necessity for the appointment of an executor depends entirely upon the place and the date of the marriage of Plaintiff and the late Isaac Peter.

In the opinion of this Court, however, whether the marriage is one in community or an ordinary Native marriage, the Plaintiff is entitled to sue.

In the case of *Nohani* vs. *Bonase*, heard at this sitting of this Court, it was decided that the widow of a Native marriage may sue to enforce her personal rights or the rights of her children: and in the case of *Novemve* vs. *Mapini*, heard in the Eastern Districts Court, on appeal from the Court of the Resident Magistrate, Mqanduli (E.D.C., vol. 7, p. 3), it was decided that the Plaintiff, a surviving spouse to a marriage in community, could recover property in the estate of her late husband that had been taken from her.

The appeal is allowed, and the ruling of the Court below set aside, and the case returned to the Court below to be gone into on its merits, costs to abide the issue.

Umtata. 12 August, 1911. W. T. Brownlee, A.C.M.

Ndim and Another vs. Klaas Tamela.

(Umtata.)

Fines—Part Payment—Settlement of Claims—Claims for Balance.

Klaas sued Defendants for two head of cattle, and in his summons stated that first Defendant seduced and made pregnant his daughter, whereby he suffered damages in five head of cattle, that three head were paid on account, and he now sued for the balance.

Defendants pleaded payment of three head of cattle and twenty sheep to Ngomeni, with whom the girl was living, and who was represented to be her guardian.

The Magistrate gave judgment for Plaintiff, and furnished the following reasons:—

"Plaintiff in this case claimed from the Defendants two head of cattle, alleging that about 1908 the first Defendant seduced and caused the pregnancy of his daughter Nobatakati, for which the Defendants only paid portion of the damages, namely, three head of cattle. He alleges that twenty sheep were tendered, but that they were rejected by Ngomeni, who acted on his behalf in the matter. The Defendant, whilst admitting the pregnancy, state that the damages (five head) were paid to and accepted by Ngomeni on behalf of the Plaintiff. It is therefore only the question of the payment of the sheep which is now in dispute, and which it was necessary to determine. There is no doubt that the Plaintiff is the proper person to receive the damages for the seduction of this girl. As regards the dispute about the sheep, I was guided entirely by credibility of evidence, the question involved being neither one of law nor custom. I am convinced beyond any doubt that the sheep were never received by Ngomeni; they were taken to the kraal, but he did not receive them."

Defendants appealed.

Pres.:—In this case the Magistrate in the Court below has held upon the evidence that only three head of cattle were paid by the Defendant, and though certain discrepancies in the evidence of the Plaintiff and of his chief witness, Ngomeni, lead this Court to view with great suspicion the whole of the evidence for the Plaintiff, yet this Court is not in a position to say that the Magistrate in the Court below has erred in his findings upon points of fact.

There is another point, however, and that is that where a Native in a case such as this has accepted payment, and has driven off cattle, he must be regarded as having accepted payment in full unless he can show very clearly that the payment was accepted only as an instalment.

In the case now before the Court it appears from the evidence of Ngomeni that the girl Nobatakati was seduced in the spring of 1908, and that the Plaintiff was informed of this fact and of the payment that had been made within one month, and that

he came down from Maclear and saw the cattle and went away again. Ngomeni says that he made this report to Plaintiff, so that he should come and sue for the balance; yet no action was taken before either the Headman or before any other Court till the beginning of this year, when Plaintiff had then already removed the girl and the cattle from Ngomeni's kraal.

If Plaintiff could have shown that it was because Defendant had no more property that he accepted only part payment, or if he had taken the matter to the Headman, and there got judgment, he might be able to succeed in his claim; but from all the circumstances attending this claim it seems quite clear to this Court that whatever was paid, whether five head or three head, was paid in full settlement.

The appeal is allowed with costs, and the judgment of the Court below is altered to judgment for Defendant with costs.

Umtata. 14 August, 1911. W. T. Brownlee, A.C.M.

Sifile vs. Sifile.

(Umtata.)

Estates—Great and Right-hand Houses—Revival of Houses—Repayment of Dowry from Eldest Daughter of Right-hand House—Deformed Daughters.

Johnson Sifile sued Mbambalala Sifile for certain property in the estate of their late father, Sifile. He alleged that his father married his first wife, Noseki, and had issue several children, of whom he himself was the eldest son; that Noseki deserted, and thereafter his father married Nohalisi to replace Noseki, and had a number of children by her, of whom Defendant was the eldest. He stated that on the death of his father he assumed control of the estate, and proceeded to distribute it, and allowed Defendant to have some of the property, which Defendant now refuses to restore. He alleged further that Defendant had given his sister Nini (Nohalisi's daughter) in marriage, and received the dowry for her, which he retains for his own use. Plaintiff stated that the dowry for Nohalisi was paid out of his mother's hut, and he was entitled to the dowry of Nohalisi's first daughter.

Defendant contended that his mother was the late Sifile's Right-hand wife, and the property sued for was his, as the heir of the Right-hand house. He also contended that Plaintiff was entitled, not to the dowry of Nini, but to the dowry of Nontsibiza, her elder sister, who, however, was said to be deformed.

The Magistrate gave judgment for Defendant, and Plaintiff appealed. The reasons for judgment were as follows:—

"The Plaintiff in this case is the eldest son of the Great house of his late father Sifile by his wife Noseki. This woman bore six children to Sifile, and their marriage was never dissolved. During his lifetime Sifile married one Nohalisi, paying ten head of cattle for her out of the property of the Great house. The Plaintiff now claims that Nohalisi was married into the Great house, and not as the Right-hand wife, and that there was no Right-hand house. The Defendant maintains that Nohalisi was married as the Right-hand wife, and that he is the eldest son and heir of that house. The property now in dispute is property attached to the family of Defendant's mother. Amongst the Tembus the law and custom is that when a commoner takes a wife, if she is the first she must be the Great wife, then if he takes another she must be the Right-hand wife. A Qadi is never appointed until after the marriage of the Right-hand wife, except in cases of persons of Royal blood, who may appoint if the tribe pays the dowry. But here we have to deal with common people. Now Noseki was never thrown away by Sifile, and she had children after he had married his second wife; so that therefore there was no need to place a seed-bearer in that house, and as Sifile had not the power to appoint, Nohalisi can only be regarded as the Right-hand wife, of which house the Defendant is undoubtedly the heir. On this point Plaintiff must fail. Then, secondly, with regard to the payment of Nohalisi's dowry from the Great house, here again the Tembu law must be followed, and it is very clear on this point. In such cases the eldest female child born to such house goes to replace the dowry paid by the Great house; there is no departure from this rule no matter what is the physical state of this child. If there is deformity or other disfigurement which might prevent her marriage, the Great house must stand to lose by it. No other daughter's dowry can be touched failing the marriage of the eldest one. The Plaintiff (if he did, which is doubtful) had no right to distribute the property of this house."

Pres.:—In this case, in the opinion of this Court, it is quite clear that the woman Nohalisi was not married into the Great house of Sifile, for at the time of Nohalisi's marriage Sifile's Great wife was still living, and had charge of some of Sifile's children, and Sifile had taken no steps to have his marriage with her dissolved; and in the opinion of this Court the Magistrate in the Court below is right in holding that the property at the kraal is the property of the Right-hand house of Sifile, and that it now devolves upon the Defendant, and that the daughters of that house are also the property of the Defendant.

The appeal is dismissed with costs.

The question of the dowry of the girl Nini was specially touched upon, and it is argued that even supposing that Nohalisi was the Right-hand wife of Sifile, the Plaintiff would be entitled to the dowry of the girl Nini, because the eldest daughter of Nohalisi (Nontsibiza), whose dowry should go to the Great house, is deformed. This Court has consulted the Native Assessors on this point, and they state that though matters of this kind have been amicably arranged between friends, yet they know of no case in which a claim of this nature has ever been decided by any Native Chief.

It might be that in equity the Great house should receive a daughter suffering from no disability, but this Court has no evidence before it of the particular nature of the deformity of the girl Nontsibeza. She herself merely says "my arm is swollen and I am deformed," and so as not to preclude the Plaintiff from bringing forward a claim for the substitution of Nini, should he be so advised, for Nontsibeza, the judgment of the Court below will be amended so as to be one of absolution, in so far as the claim for the dowry of Nini is concerned.

Umtata. 15 August, 1911. W. T. Brownlee, A.C.M.

Luti vs. Siqola and Siqola.

(Umtata.)

Estates—Administration by Native Custom or Colonial Law—Marriages by Christian Rites Before and After Annexation—Inheritance through Christian Marriage—Widows' Rights to Sue—Community of Property—Prospective Dowries as Estate Assets.

Maria Luti, in her individual as well as her representative capacity as natural guardian of the minor Enoch Luti, and

assisted by Philemon, the legal guardian under Native custom, sued Defendants Joseph Siqola and Emma Siqola for certain property belonging to the estates of Nathaniel Luti and Paul Luti, to which the minor Enoch Luti was heir.

The summons set forth that the late Nathaniel Luti, who died many years ago, married by Native custom a woman named Nosena, by whom he had one son, named Paul Luti; that after the death of Nosena, Nathaniel married, before the issue of Proclamation 140 of 1885, a woman named Annie, by whom he had no sons but six daughters, one of whom was second Defendant; that Paul Luti in 1887 married by Christian rites the Plaintiff Maria, by whom he had several sons and daughters, the eldest being Enoch Luti; that Paul died about 1908, in the lifetime of the widow Annie, and Maria then became the natural guardian of Enoch, and Philemon the legal guardian under Native custom; that Paul on the death of Nathaniel became his heir, and entitled to the estate and the dowries of the daughters of Annie, and by the death of Paul, his son Enoch became heir of his grandfather and father, and entitled to the estates of both and to the dowries of the daughters of Nathaniel; that during the lifetime of Annie the estate of Nathaniel was left with her under Native custom for her support. Plaintiffs proceeded to claim certain property in the estate of Nathaniel which Defendants had obtained possession of from Annie prior to her death in 1910, but which Defendants maintain to have inherited through Annie.

Defendants put in a plea in abatement that as Paul Luti was married by Christian rites his estate must be administered by Colonial law, and consequently only an executor could maintain the action. A consent paper tendering part of the property claimed was filed.

In replication Plaintiffs deny that the estate of Paul was in question, and contended that the action solely referred to the estate of Nathaniel and the rights of succession thereto, and as the marriages of Nathaniel were both before Proclamation 140 of 1885, the plea in abatement was bad in law; but if the Court held that it was the estate of Paul that was in question, Plaintiffs said that by virtue of the community of property in the marriage between Paul and Plaintiff, the Plaintiff was entitled to hold charge of the joint estate of Paul and herself, in which she had a half interest, whereas Defendants had no right of possession whatever.

The Magistrate upheld the plea in abatement, and gave judgment in terms of the consent paper filed. He gave the following reasons:—

"It is admitted in the proceedings that the late Paul Luti was married according to Christian rites, subsequent to the coming into operation of Proclamation No. 140 of 1885, and so therefore the *whole* of his estate must be administered according to Colonial law, in which case an executor should be appointed to administer it, and he alone can maintain an action in the estate. The property which this claim concerns is that of the Christian marriage of the late Nathaniel Luti (Paul Luti's father), whose marriage was before this Proclamation came into force. The question is: "How is this property affected?" It is admitted that Nathaniel died before Paul, and so the latter being Nathaniel's heir, the property, on the death of Nathaniel, would at once vest in him (Paul), and it would become part of his whole estate, and would thereby become subject to the same laws which govern the rest of the estate, and it is through Paul that the present Plaintiff, Enoch Luti, derives his rights. Judgment is therefore for Plaintiff in terms of consent paper attached with costs up to and inclusive of the 18th January, 1911. The plea in abatement is upheld, Plaintiff paying costs of the 3rd March, 1911."

Plaintiff appealed.

Pres.:—The points to be decided in this case are:—

1. Whether the Plaintiff Maria, the widow of a marriage in community, may sue as the surviving spouse for the delivery to her of estate property pending its proper administration.

2. Whether the minor Enoch, in whose interest the Plaintiff sues, is to inherit certain property in the estate of his grandfather, the late Nathaniel—such property including the rights in dowries yet to be paid for certain daughters of Nathaniel—directly from Nathaniel, or whether he is to inherit through his father, Paul, the son of Nathaniel, who was predeceased by the said Nathaniel.

The first point seems to have been decided in the case of *Noremve* vs. *Mapini* (E.D.C., vol. 7, p. 3), heard in the Eastern Districts Court, on appeal from the Court of the Resident Magistrate of Mqanduli, in which it was decided that a surviving spouse in a marriage in community could recover property in the estate of the late husband which had been taken from her.

The Plaintiff Maria in this case would therefore appear to be entitled to obtain, for the purpose of holding, property in the estate of her late husband, Paul Luti.

With regard to the second point, in the opinion of this Court it seems to be clear that whatever property was left by the late Nathaniel would, under Native custom, at once become the property of his son Paul, and that this would apply also to whatever property there might be in the house of Nathaniel's second marriage; for although this was a marriage in Church, yet having been contracted prior to the Annexation of Tembuland, has no other effect than that of a Native marriage (see *Sekeleni* vs. *Sekeleni*, S.C. Reports, vol. 21, p. 118); and it seems further to be clear that Nathaniel having predeceased Paul, and seeing that Nathaniel's estate must be administered in accordance with Native custom, the minor Enoch can inherit only through Paul.

In the case of *Lepuwana* vs. *Lepuwana* (Henkel, p. 72), however, where there had been a Christian marriage, and the dowry of a girl named Lilian was in question, it was laid down by this Court that as, at the time of her father's death, the girl Lilian was unmarried, and could not in any sense be regarded as an asset in the estate, the estate could have no claim for dowry subsequently paid for her, and that the dowry goes, in accordance with Native custom, to the nearest male heir.

That being so, it seems clear to this Court that though all assets in the estate of Nathaniel existing at the time of his death would at once and automatically devolve upon Paul yet the dowries for Nathaniel's daughters married after the death of Paul would go to Enoch direct, and not through the estate of Paul.

In the opinion of this Court the Plaintiff, Maria, in her capacity of surviving spouse, is entitled to sue for existing estate property in the estate of her late husband, Paul, and in her capacity as representing the minor Enoch, she, having the consent of her guardian, Philemon, under Native law is entitled to sue for property accruing to him from the dowries of the daughters of the late Nathaniel.

The appeal is allowed with costs, and the ruling of the Court below set aside, and the case remitted to the Court below to be heard upon its merits.

In the opinion of this Court the daughters of Nathaniel's union with Annie have no claim, as the marriage of their mother had no other effect than that of an ordinary Native marriage.

Kokstad. 22 August, 1911. A. H. Stanford, C.M.

Godlo vs. Godlo.

(Matatiele.)

Guardianship—Payment of Dowry for Younger Son—Cession of Action.

The parties to the case were Hlubis. Plaintiff in his summons asked for (1) a declaration of rights as to whether Defendant was or was not under Hlubi custom the guardian of Plaintiff; and (2) either (*a*) twenty-five head of cattle and one horse, which Defendant as guardian is bound to pay to assist Plaintiff to marry, or (*b*) fifteen head of cattle and one horse received by Defendant as dowry for their sister, which Defendant was bound to hand over to Plaintiff by virtue of a deed of cession given by their father to Jan Godlo.

He went on to say that Jan Godlo had married the widow of one Dyasi Godlo, his brother, who died without male issue, and had issue six females and six males, of whom Defendant was the eldest and Plaintiff one of the younger sons; that Defendant had received the dowry for one of the daughters; that defendant contends that Jan had not married, but merely "ngenaed" the widow, and that consequently he (Defendant) was entitled to the dowry received for their sister; but Plaintiff maintains that Jan Godlo did marry the widow according to Hlubi custom; that if Plaintiff is not his guardian, then Jan Godlo is, and the latter had transferred to Plaintiff his rights in the dowry of the girl in question under a deed of cession, and under this cession he sued on the alternative claim.

Defendant excepted that Plaintiff, being a major, cannot be under the guardianship of either himself or Jan Godlo, and therefore the summons disclosed no cause of action.

Defendant admitted he was over twenty-one years of age, and the Magistrate dismissed the summons.

Defendant appealed.

Pres.:—In the summons the term "guardian" has throughout been wrongly used. The Appellant, being a major, is not under guardianship; he may have a moral claim against the Respondent, as head of the family, if he is so, for assistance in getting married, but the grounds of the action should be properly stated, and for this reason the Magistrate's ruling will be supported, and the appeal dismissed with costs.

In order to save further litigation and unnecessary expense, the Court feels bound to point out that the claim the Appellant desires to make is one which can only be dealt with under Native law and custom, under which no such thing exists or is recognised as a cession of right of action.

The summons furthermore contains alternative claims in conflict one with the other, and throughout the issues are confused, and are such as should not be combined in one summons.

Bizana. 30 August, 1911. A. H. Stanford, C.M.

Mketengo vs. Mkamisa.

(Bizana.)

Native Doctors—Fees—Mkonto.

Mkamisa sued Defendant (a Native doctor) for £5 10s., which he alleged he had paid Defendant at Defendant's kraal, and in consideration of which Defendant promised to doctor Plaintiff's wife, who was sick. Defendant, however, failed to appear, and refused to return the money.

Defendant denied the transaction, but the Magistrate gave judgment for Plaintiff as prayed, and in his reasons stated the matter was one of credibility.

Defendant appealed.

In allowing the appeal, and reversing the Magistrate's judgment, the Appeal Court said that the usual fee, known as "Mkonto," paid to a Native doctor to bring him to the patient's kraal is a goat or 5s., and Plaintiff's statement that he paid Defendant £5 10s. was, under the circumstances, one not to be credited.

Butterworth. 6 November, 1911. A. H. Stanford, C.M.

Sabela and Another vs. Ntutusile.

(Kentani.)

Kraal Head Responsibility.

Ntutusile sued Sabela and his father for damages for adultery. The adultery was clearly proved, but the father claimed absolution, on the ground that his son was married and had his own

separate kraal. Shweni said his son had been away at work for two years, but had lived with him since his return for about six weeks, because first Defendant's own hut had fallen down. He admitted that Sabela's family had lived with him for some time.

The Magistrate gave judgment for Plaintiff, and held that second Defendant, as kraal head, was also liable.

Defendants appealed.

Pres.:—The evidence shows that Sabela at present has no kraal of his own, and is resident with his father, and that for the past two years his family has stayed there. Under these circumstances it must be held that his stay there is not of a temporary nature.

The appeal is dismissed with costs.

Butterworth. 6 November, 1911. A. H. Stanford, C.M.

Lupusi vs. Makalima.

(Tsomo.)

Dowry Restoration—Engagements to Marry—Marriage by Christian Rites—Immorality on Part of Man.

Makalima sued Lupisi for the restoration of seven head of cattle, which he stated he had paid to Defendant on account of a marriage to be contracted between himself and Defendant's daughter Henrietta. He stated that he had become engaged to Defendant's daughter in 1906, and between this date and 1909 he paid Defendant seven head of cattle as dowry, and thereupon Defendant agreed to the marriage on payment of an eighth beast; that in August, 1911, Plaintiff tendered the eighth beast, but Defendant refused to accept it, on the ground that Defendant alleged that Plaintiff had broken off the engagement, and thereby forfeited the cattle paid. Plaintiff went on to say that he had never broken off the engagement, and never had any intention of doing so, and he asked for an order that the Defendant should allow the marriage or otherwise return the cattle.

Defendant in his plea admitted the engagement and the number of cattle paid, of which three had died and the remainder had increased to seven. He also admitted the allegation in the summons of refusal to accept the eighth beast, and said his grounds of refusal were that Plaintiff himself, in August, 1910, broke off

the engagement, and since then he had had immoral relations with another girl.

Plaintiff admitted causing the pregnancy of another girl, but denied that he ever intended to marry this girl, or that he had ever broken off the engagement with Henrietta. He stated that he did break off the engagement by letter, but on reconsideration immediately followed it up and effected reconciliation with the girl Henrietta. The evidence showed the marriage was to have been by Christian rites.

The Magistrate gave judgment for Plaintiff for seven head of cattle, and Defendant appealed.

The Magistrate's reasons were as follows:—

"The Defendant relies on the letter marked 'D,' but the circumstances surrounding this letter must be taken into consideration.

"The letter 'D' was written by Plaintiff in reply to one he had received from the girl. After despatching his letter he appears to have reconsidered the matter, and follows up his letter. The girl receives him, and he remains with her in the hut all night. The Plaintiff states that the girl had forgiven him. The girl keeps the letter for four months, and as soon as Plaintiff goes to work she shows it to her father. The Plaintiff on his return sends another beast to the Defendant, which is refused. If the girl had not forgiven the Plaintiff she would not have allowed him to remain with her all night in her hut, nor would she have kept the letter so long from her father, and if the engagement had been broken off it is not likely that the eighth beast would have been driven to the Defendant. These facts, to my mind, show that the engagement was not broken off, but that Defendant wishes to receive two dowries for his daughter. I therefore consider that the Plaintiff is entitled to the return of his dowry should the father refuse to allow the marriage to take place."

Pres.:—In this case the Respondent, following on previous correspondence with his *fiancée*, wrote breaking off the engagement, but speedily followed on his letter, and says a reconciliation took place. This the girl denies, but as she did not at once communicate the contents of the letter to her parents, the only conclusion which can be arrived at is that a reconciliation was effected; but there is no doubt that the insult she received rankled in the girl's mind, and four months later, when she learned that the Respondent had caused the pregnancy of another girl, she then produced the

letter and showed it to her father, and on the strength of the two things combined refuses to fulfil her engagement.

The conditions governing the payment of and recovery of dowry amongst professing Christian Natives are in many respects different from the procedure observed amongst heathen Natives. The engagements, as in the present instance, are frequently of long duration, and misconduct on the part of the girl is always sufficient grounds for the man to break the engagement and recover the cattle paid on account of dowry. It is only just that the converse should apply, and this was held to be so by the Eastern Districts Court in the case of *Hebe* vs. *Mdinelwa Mba* (12 E.D.C. 6).

The Respondent by his misconduct with Pambani's daughter has given sufficient cause to justify the girl in refusing to enter into the marriage, and the Respondent, under the circumstances, is not entitled to recover the cattle he paid.

The appeal is allowed with costs, and the judgment in the Magistrate's Court altered to judgment for Defendant with costs.

Butterworth. 6 November, 1911. A. H. Stanford, C.M.

Lutoli vs. Sontshebe.

(Idutywa.)

Adultery—Second Marriage—Father Holding Two Dowries—Husband's Desertion.

Sontshebe sued Lutoli for five head of cattle as damages for adultery.

Defendant admitted intercourse, but denied that the woman was Plaintiff's wife.

It appeared that the woman had been married to a man named Qoko, and lived with him for about six years. Thereafter Qoko went away to work, and has not since returned, and she went to the kraal of her father, the Defendant, and lived there for some years before being given in marriage to Plaintiff. The father stated that Qoko had never claimed the return of his dowry, and that he was quite prepared to hand it over.

The Magistrate gave judgment for three head of cattle, and Defendant appealed. The following reasons were given:—

"I understand that the appeal is on the grounds that the dowry paid by the first husband not having been returned, the woman cannot be the wife of the second husband. In addressing the Court Mr. W. E. Warner, Attorney for the Defendant, quoted the case, *Mditshwa* vs. *Nqeneka*, page 105 Henkel's reports, and also another. Mr. Clark, the Attorney for the Plaintiff, quoted case, *Pike* vs. *Madi* page 95 Henkel's reports. I am satisfied that this is a case of desertion by the first husband, he having been away from the district for fourteen years, and he has never in any way supported his wife, and I consider that her father was quite justified in letting her be remarried. He states that he is prepared to restore the first dowry when called upon to do so. I would draw the attention of the Court to case, *Mtuyedwa* vs. *Tshisa*, page 122, Henkel's reports."

Pres.:—The question having been submitted to the Native Assessors they state "A father of a woman cannot have two dowries for the same woman. In this case Qoko married the woman, had two children by her and went to work, and the woman returned to her father where the second man saw her and paid six cattle to the father. We say the father had no right to re-marry the woman not having returned the first dowry or taken action before the Magistrate or Headman to have the marriage cancelled. We say this woman is the wife of the first husband and the cattle paid by the Respondent are his as damages. Both he and the man he sues are adulterers."

The woman Nohofolo, for whose pregnancy damages are claimed by the Respondent from Appellant, is the daughter of Ranayi, by whom she was given in marriage to Qoko who paid eight head of cattle as dowry and with whom the woman lived as his wife and bore him two children. Some years ago Qoko went to work and has not since returned. During his absence his wife went back to her father's kraal and after being there about seven years Respondent took her and paid six cattle as dowry to her father Ranayi who says by reason of Ooko's desertion of his wife he is entitled again to give her in marriage although the marriage with Qoko has not been annulled or his dowry returned.

The Appeal Court sitting both at Umtata and Butterworth has clearly laid down that with the Tembu and Transkeian tribes a Native woman during the subsistence of a previous marriage cannot validly contract a second marriage, and that a man taking a

woman under such conditions can only be regarded in the light of an adulterer, this being so Respondent can have no claim against the Appellant.

The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment " for Defendant with costs."

Butterworth. 6 November, 1911. A. H. Stanford, C.M.

Tutu vs. Tutu.

(Butterworth.)

Estates—Rights of Widows—Marriages by Christian Rites and Native Custom—Proclamation 227 *of* 1898—*Act* 18 *of* 1864.

Emily Tutu sued Nofama Tutu for certain property in the estate of her late husband Magwaxaza Tutu.

It appeared that Plaintiff Emily had been married to the late Tutu by Christian Rites and Defendant Nofama was the wife of the Right Hand House married according to Native Rites. Plaintiff claimed half the estate on account of the marriage by Christian Rites and the community of property established by this marriage.

Defendant excepted to the summons on the grounds that the action was brought under Colonial law whereas under the provisions of Proclamation 227 of 1898 the estate should be administered according to Native Law.

It was admitted that the late Magwaxaza was the holder of a quitrent title under Proclamation No. 227 of 1898.

The Magistrate allowed the exception and gave the following reasons:—

Plaintiff in this case claims half the estate of her late husband as having been married to him by Christian rites, and therefore in community of property, from Defendant who is the Right Hand Wife of her husband. Exception was taken that according to Proclamation 227 of 1898 the estate should be administered according to Native Law. Section No. 20 of the Proclamation certainly seems to support the exception. It is however identical as far as the word " district " with the phraseology of Section No. 3 of Act No. 18 of 1864. It was decided in the case of *Mazamisa* vs. *Mazamisa* (E. D. Court, 1909), and in the Supreme Court in the case of *Estate Tantsi* vs. *Executors Estate Nchele* (21 Juta,

648), that Section No. 3 of Act 18 of 1864 does not abolish community of property between Native spouses married according to Christian rites. From these decisions it would seem to follow that nothing in Proclamation 227 of 1898 abolishes community of property between natives married according to Christian rites and in the case of *Hartley* vs. *Ngwabeni* (C.T.L.R. Vol. 20, page 710) the presiding judge stated it was a question of law whether the Proclamation has the effect of overriding the law of the Colony establishing community in marriages according to Colonial law.

With these decisions before me I would have been inclined to hold that community of property was established between the Plaintiff and her late husband, and that she is entitled to sue for one half the estate, but in a case involving the same estate, which came before the Native Appeal Court in July, 1909, the Appeal Court dismissed an appeal from the decision of the Assistant Resident Magistrate, Butterworth, that the estate was to be administered according to Native law. I consider this Court is bound to observe the decisions of the Native Appeal Court in Native cases, and therefore allowed the exception, though it is possible the Appeal Court would have arrived at a different ruling had the judgments referred to above been before it.

Plaintiff appealed and on the 7th March, 1911, the Appeal Court gave the following judgment:—

In this case the issues involved are wider than those raised in the exception and one of the points to the excussion of which the Plaintiff is entitled whether the case is to be decided by Colonial or Native law is whether the property in question is or is not that in respect of which a decision was given in the case of *Nofama Tutu* vs. *Mai Tutu* referred to by the Magistrate in his reasons for judgment.

The appeal is allowed with costs and the exception overruled and the case remitted to the Court below to be heard upon its merits.

A point of considerable importance is that of the date of the legal marriage contracted between the Plaintiff and the late Magwaxaza Tutu.

On the further hearing the Magistrate gave judgment for Defendant and Plaintiff appealed.

Pres.:—The late Magwaxaza Tutu and his wife Emily Tutu were married by Christian rites in the year 1884 after the annexation of the Transkeian Territories, in which the marriage was celebrated,

to the Cape Colony. Consequently the provisions of the Roman-Dutch law applied to the marriage. The provisions of Section 19 of Proclamation No. 227 of 1898 are the same as those of Section 2 of Act 18 of 1864 with the exception that in the place of the words " be the holder of a certificate of citizenship " are substituted " shall be a holder of a quitrent title under this Proclamation."

In dealing with certain cases which have recently arisen, the learned Judges of the Eastern Districts Court have held that the provisions of Act 18 of 1864 have not the effect of abolishing the community of property existing under marriages celebrated under the common law of the Colony and that only the deceased husband's portion of the estate can be administered in accordance with Native custom, the surviving wife being entitled under the community of property in the marriage to claim half the joint estate.

The conditions laid down under Act 18 of 1864 and Proclamation No. 227 of 1898 being precisely the same this Court is of opinion that the decision of the Eastern Districts Court must apply to marriages which were existing at the time Proclamation No. 227 of 1898 was promulgated, and as a consequence the Appellant in this case is entitled to claim half the joint estate of her late husband Magwaxaza Tutu and herself and that the remaining half under Native custom vests in his heir.

The late Magwaxaza Tutu having been married to his wife under the common law of the Cape Colony could not during the subsistence of that marriage contract any other marriage and consequently his union with the woman calling herself Nofama Tutu, though entered into in accordance with Native custom and by payment of dowry, was not a valid marriage.

While this Court is not able to set aside the judgment of the Appeal Court in the case of *Nofama Tutu* vs. *Mai Tutu* heard on the 14th July, 1909, it is constrained to give a ruling on this important question in the present issue in so far as the claim of the Appellant is concerned. As far as can be ascertained from the records in the case the property belonging to the estate of the late Magwaxaza Tutu in the possession of the respondent is three head of cattle, twenty-five goats and thirty sheep and Appellant is entitled to half this property which may be roughly divided in the following manner:—Appellant to have one beast, twenty goats and fifteen sheep.

For the reasons given above the appeal is allowed, the Magistrate's judgment set aside and judgment entered in the Magistrate's Court for Plaintiff for one beast, or value five pounds, twenty goats, or value ten shillings each, and fifteen sheep, value ten shillings each. The case being one of such an exceptional nature no order will be made as to costs.

Butterworth. 7 November, 1911. A. H. Stanford, C.M.

Noveliti vs. Ntwayi.

(Nqamakwe.)

Widow's Rights—Maintenance from Estate Property—Rights of Action Against Guardian.

Noveliti sued Ntwayi for certain property in the Estate of her late husband which Defendant had appropriated. She alleged in her summons that the heir of the property was her minor son and Defendant was guardian of the family.

Defendant took exception to the summons that Plaintiff had no *locus standi* in the action and the proper person to sue was the heir of the Estate.

The Magistrate sustained the exception and gave the following reasons:—

The Defendant is the guardian of Plaintiff and of her minor son Kivit—who is away at work. The stock in question are in Defendant's possession and have been so for a number of years.

No mal-administration is alleged in the summons, and from the evidence led there does not appear to have been any spoliation. In my opinion Plaintiff cannot sue in her own name unless there was spoliation or mal-administration of the estate. I, therefore upheld the exception which I consider good in law.

Plaintiff appealed.

Pres.:—The Court has frequently pointed out that every Native woman has a right of action against the guardian of her deceased husband's estate to protect herself and the rights of her children. The widow also has a usufructuary interest in the property of the estate and has a right to be maintained together with her children by the property in her husband's estate.

The appeal is allowed with costs. The Magistrate's ruling on the exception is set aside and the case returned to the Magistrate to be heard on its merits.

Butterworth. 7 November, 1911. A. H. Stanford, C.M.

Mahlaka vs. Maria Mahlaka.

(Nqamakwe.)

Widow's Rights—Maintenance—Dowry Distribution—Contributions by Women to Wedding Outfits—Reimbursement.

Joab Mahlaka, heir of the late Mahlaka, sued his mother Maria for nine head of cattle, being dowry of four head of cattle received for his sister Rosie and their increase which Defendant refuses to give up to him.

Defendant in her Plea admitted possession of five head of cattle which she retained for the support of herself and family. Plaintiff lived away from Defendant and Defendant said if these cattle were handed over she would be without means of support. The evidence showed that Defendant's daughter Abigail, a teacher, had contributed to the outfit of the girl Rosie and when the dowry was distributed Abigail was given two oxen. These two oxen were exchanged with Plaintiff for a horse and afterwards the horse was exchanged for a cow and a calf and these two cattle with one increase were with Defendant. One of the dowry cattle had died and altogether there were eight head, three of which were Abigail's property. Defendant was willing to live with Plaintiff provided he supported her.

The Magistrate gave judgment for five head and absolution in regard to three and ordered that the cattle were not to be removed until Plaintiff had provided suitably for his mother and sisters.

Plaintiff appealed.

Pres.:—It is clear from the evidence that the girl Abigail contributed the wedding outfit for her sister's marriage and that she is entitled to be reimbursed from the dowry received. The distribution alleged to have been made may not have been done in so formal a manner as is usual but it is proved that she exchanged the two oxen for a horse and later the horse for a cow and calf without question on the part of Appellant who thus tacitly recognised her ownership of the two oxen.

Appellant states there is no other stock at their kraal for his mother's support for which he is responsible, and notwithstanding he wishes to take the whole to pay away as dowry and leave her practically unprovided for. This clearly shows the necessity for the order made by the Magistrate.

The appeal is dismissed with costs.

Umtata. 20 November, 1911. A. H. Stanford, C.M.

Maziwayo vs. Mrapukana.

(St. Mark's.)

Practice—Writ—Death of Plaintiff—Substitution of Heir.

Maziwayo on 13 November, 1905, obtained a judgment against Mrapukana and on a writ being issued on 28 November, 1905, a small amount was recovered. Maziwayo had died and Ntaminani his son and heir on 15 July, 1911, caused an alias of writ to be issued. Mrapukana applied to the Court to have the writ set aside on the grounds that it was (1) improperly issued upon a superannuated judgment which had never been revived, (2) that the Plaintiff had since died and that Ntaminani was not a party to the suit and could not be substituted as Plaintiff except by an order of Court.

The Magistrate dismissed the first objection on the authority of Van Zyl, page 310 but upheld the second and set aside the writ with costs.

Plaintiff appealed.

Pres.:—Under Native law and custom the heir of a deceased person is practically the executor in the estate and under the provisions of Proclamation No. 142 of 1910 this position is recognised and specifically provided for in section 12 of the Proclamation which also provides that no letters of administration from the Master of the Supreme Court shall be necessary. But it is essential that an individual claiming to be heir, must satisfy the Court of his status. In the present case there is no evidence to show that Ntaminani is the heir of the late Maziwayo.

The proper course to be followed in such case would be for a person claiming to act under such circumstances, to apply to the Court for authority giving notice to the opposite party of such

intention in order that he may appear and contest should he have reasonable grounds for doing so—and until the Court has granted the authority it is not competent in such a case as the one under consideration for the heir to take out an alias of writ.

The appeal is dismissed with costs.

Umtata. 20 November, 1911. A. H. Stanford, C.M.

Mpotyi vs. Ntlanganiso and Toro.

(Saint Mark's.)

Kraal Head Responsibility—Temporary Residents.

Mpotyi sued Ntlanganiso, and Bly Toro as head of the kraal, for damages for adultery. The Magistrate gave provisional judgment as against Ntlanganiso and absolution as against Toro and furnished the following reasons:—

It is clear that Ntlanganiso is not a near relative of Bly Toro, the second Defendant, nor has he at any time lived at Bly's kraal with the latter's consent.

Ntlanganiso has been allotted a kraal site by Headman Domkrag and he has lived in huts in Domkrag's location with his family thereby establishing his own kraal.

In the present instance Ntlanganiso went with his family to Bly Toro's kraal during Bly's absence at work. While he was there he is alleged to have committed adultery with Plaintiff's wife.

There is nothing in the evidence which suggests that he had the slightest natural right to be at his kraal and as Bly was away all the time that Ntlanganiso was there it is unreasonable to my mind to hold him responsible for what is said to have happened. If this were allowed no man leaving his home for work would be safe.

Plaintiff appealed.

Pres. —The evidence disclosed that the first Defendant Ntlanganiso lived for a time with his brother Zondani in Domkrag's location; that he was subsequently allotted, conditionally, a kraal site which he occupied in that location, that during the absence of Respondent (Toro) he was for a time at his kraal, but there is nothing to show that he was there with Respondent's knowledge or consent. Under such circumstances it cannot be held that Respon-

dent is responsible for torts alleged to have been committed by Ntlanganiso while at his kraal.

The appeal is dismissed with costs.

Umtata. 23 November, 1911. W. T. Brownlee, A.C.M.

Radoyi vs. Ncetezo.

(Tsolo.)

Marriage Dissolution—Return of Dowry—Ownership of Children.

In this case Radoyi was Plaintiff and Ncetezo Defendant.

The case is stated in the Magistrate's reasons for his absolution judgment as follows:—

The Plaintiff in this case claims:—

(*a*) A declaration of rights in regard to certain two female children.

(*b*) Delivery to his control and custody of the said children.

He alleges in his summons:—

1. That he married Defendant's daughter about eleven years ago.

2. That during the subsistence of the marriage his wife has had two female children.

3. That he is the father of one of these children whose name is Nomatilatila.

4. That he is not the father of the other child whose name is not known to him.

5. That the marriage was dissolved and the dowry paid by him to Defendant returned about the month of June last.

The Defendant denies the marriage and says that his daughter was seduced and made pregnant by Plaintiff who paid five head of cattle as a fine, that his daughter has had two children by the Plaintiff, both of whom are dead, and that the two children claimed are not by Plaintiff, and that he is not entitled to them. He admits returning the cattle paid and says he did so in accordance with a judgment of Headman Nongavula.

He pleads further that, in the event of the Court holding that a marriage did exist, the Plaintiff having accepted the return of all the cattle paid, has forfeited all right to the children. Should the Court however hold that the Plaintiff is entitled to the children Defendant claims in reconvention eight head of cattle, *i.e.* one beast for each child born and one beast as maintenance for each child.

The following questions have therefore to be decided:—

1. Was there a marriage according to Native custom?

2. How many cattle were paid?

3. Whether, if all the cattle were returned Plaintiff is entitled under Native custom, to the children?

In regard to the first point I am satisfied both from the evidence and surrounding circumstances that a marriage did exist.

The evidence with reference to the number of cattle paid is of a very conflicting nature and I do not consider that the Plaintiff has conclusively proved that seven head were paid. Assuming therefore that only five head of cattle were paid, and all these were returned and accepted by the Plaintiff, can he, under Native custom, claim the children.

As I was not sure of the custom on the point I consulted some of the Headmen who are said to be well versed in Native law and they say that, when a man accepts the return of all the dowry cattle paid by him he is said to have discarded the children and cannot come forward afterwards and claim them. When the return of all the dowry was tendered his proper course would have been to have left one beast for each child born whether legitimate or illegitimate.

The question as to whether it would be competent for the Chief, and in accordance with custom, after the acceptance of all the dowry cattle, to make an order declaring the husband entitled to the children on payment by him of the usual cattle maintenance, etc., was also put to them and the reply was that such an order would be contrary to custom, and the only course open to the husband would be for him to go to the father of the woman and "pay dowry" for the children.

Under these circumstances judgment of absolution from the instance with costs will be entered.

Pres.:—The first point to be decided in this case is whether there was or was not a marriage, and after considering all the evidence this Court is of opinion that the Magistrate in the Court below is right in the conclusion that there was a marriage.

The next point to be considered is the point of the number of cattle paid by the Plaintiff and on this point the Magistrate is not satisfied that the Plaintiff has proved that he paid seven head, and this Court sees no reason to interfere with this conclusion or with the opinion that all the dowry paid by the Plaintiff has been re-

turned to him, and it is in any case quite clear that the plaintiff has had more cattle returned to him than he is entitled to claim.

The Defendant would be entitled to detain one beast for each child born during the marriage whether legitimate or illegitimate and there are three or four children to be calculated for according to the decision as to the first two children whether they were twins or children born at separate and distinct periods. If twins they would count as one birth seeing that they are both dead and they would count as two children only if they had both lived. There would also be one deduction at least in respect of wedding outfit and the Defendant would thus at the lowest computation be entitled to retain four cattle, and on the basis of the payment by Plaintiff of only five cattle he would be entitled to receive from Defendant only one beast were deduction in respect of children and outfit made. Plaintiff has however accepted five head of cattle and going on the assumption that he himself paid only five cattle he has himself extinguished all claim that he might have to the children born of the marriage between himself and the Defendant's daughter and could not therefore be entitled to claim them.

The appeal is dismissed with costs.

Umtata. 24 November, 1911. W. T. Brownlee, A.C.M.

Nkoti vs. Ndlela.

(Qumbu.)

Kraal Head Responsibility—Joining of Defendants.

Ndlela sought to make Nkoti liable, as father and guardian of Xayimbi and head of the kraal at which Xayimbi resides, for an unsatisfied judgment obtained against Xayimbi for damages for seduction.

Defendant excepted to the summons that as Plaintiff had failed to join him as co-Defendant in the original action he was estopped from the present action.

The Magistrate dismissed the exception and Defendant appealed.

The following reasons were furnished:—

The present Defendant's son was sued for damages for seduction and a judgment obtained against him. The present Defendant was

in that case summoned to assist his son (who was a minor) but was not summoned in any other capacity. The present Defendant excepts to the summons on the grounds that as he was not joined in the original action otherwise than as guardian of his minor son the Plaintiff is estopped from suing him in his individual capacity. Native law and custom allow the Plaintiff this right even where the father had not been previously joined. Our Courts have varied this custom in cases where it has been found to work unjustly and I think rightly so. I do not think any of the dicisions of the appeal Court have expressly abrogated this custom. They have proceeded rather on the lines of limiting its application: thus where a guardian of a Defendant was not joined in an action in which Plaintiff obtained a judgment he was nevertheless held liable to pay the damages assessed against his son where it was shown he had previously been joined with his son but absolved from that particular instance. The matter therefore would appear to depend on the question whether the guardian had an opportunity of assisting in the defence of the original action. It is, I think, futile to argue that because it was not sought to make him liable in the original action he was thereby prejudiced for the only defences in absolute bar of Plaintiff's claim open to him are *First* –non-liability from a paternal point of view, *Second*—non-liability through innocence of his ward. The first defence is open to him in the present case. The second is a defence which comes to him only through his ward, as the father, not being a joint tort feasor, need himself set up no defence on these lines nor is it possible for him to do so. He would however be prejudiced were his minor son to be sued unassisted and a judgment obtained against him as the parent would thereby be an entire stranger to the proceedings on which it is subsequently sought to make him liable.

In other words the father or guardian not being the party charged with the seduction cannot himself refute the charge. His son alone can do that. The parent's liability arises only on the son failing to make good his defence. The parent has his special defence, e.g. that his son was not an inmate of his kraal and was a major at the time of the commission of the tort. As already remarked this defence is still open to him in the present proceedings.

Pres.:—The judgment of this Court in the case of *Rubulana* vs. *Tungana* (Henkel, p. 90 and 91) is very clear and lays down the principle that when a kraal head has not been joined in an action

for damages against an inmate of his kraal a separate action may not subsequently be brought against him. This same principle was again enunciated in the case of *Buza* vs. *Gqenyu*, not reported but heard in this Court at Umtata in July, 1907, and again in the case of *Mfanyana* vs. *Mbesi* (Henkel, p. 234, 235.)

In this case this Court is of opinion that the citing of the Defendant to assist his son Xayimbi in the original action is not such a joinder as would entitle the Plaintiff to raise the present action against the Defendant, and that, the Plaintiff having elected originally to sue Xayimbi alone is not entitled now to raise this action against the Defendant.

The appeal is allowed with costs and the ruling of the Court below set aside and the exception (or rather special Plea) is allowed and the summons dismissed with costs.

Umtata. 24 November, 1911. W. T. Brownlee, A.C.M.

Ndupana vs. Mxaxeni.

(Qumbu.)

Seduction and Pregnancy—Death of Girl Before Litis Contestatio.

Mxaxeni sued Ndupana for five head of cattle as damages for the seduction and pregnancy of his daughter Estha. The case was set down for 27 June, 1911, and postponed to 10 August, 1911. The girl Estha died on 17 July, 1911, in an advanced state of pregnancy. On the postponed date Defendant applied for absolution on the grounds that the girl had died before *litis contestatio* had been reached in the case. The Magistrate refused the application and on the evidence gave judgment for Plaintiff for three head of cattle. In his reasons the Magistrate said it was clear that the girl was taken to Defendant's kraal and that she there charged Defendant with being the cause of her pregnancy.

Defendant appealed.

In the Appeal Court the point of this application was put before the Native Assessors and they made the following statement of Native custom:—"It is only when a girl dies without having accused anyone that no case lies, but where a girl dies after having accused someone it is then competent to bring an action and the case is decided according to the evidence."

In view of this statement the Appeal Court held that the Magistrate rightly refused the application and dismissed the appeal with costs.

Umtata. 27 November, 1911. W. T. Brownlee, A.C.M.

Dana vs. Nqiwa.

(Qumbu.)

Dowry—Payment of Money—Appeal—Absolution Judgment.

This was an action by Nqiwa for damages for adultery.

Defendant admitted the act but denied that this woman was Plaintiff's wife.

Plaintiff alleged he had paid Gomba the woman's guardian the sum of £15 as dowry and that this money was accepted as three head of cattle.

After Plaintiff closed his case absolution was applied for but refused and Defendant appealed.

The Appeal Court (2 August, 1911), returned the case to be proceeded with as a refusal to grant an absolution judgment or sentence as defined by Rule 33 of the Magistrate's Court Act was not a final judgment and the refusal gave no right of appeal.

At the further hearing it appeared that a man named Monki was the woman's brother and her guardian and in his evidence he stated that Gomba had a right to receive the dowry as she had grown up at the latter's kraal.

The Magistrate found that a marriage had taken place and gave judgment for Plaintiff and Defendant appealed.

Pres.:—The point of the payment of money as dowry having been put to the Assessors and the question asked whether such a payment is competent payment of dowry, they state that if a man has paid money as dowry and such money payment has been accepted and there is sufficient proof of such payment having been made it is a marriage and that since Monki admits that Gomba would be justified in accepting dowry Plaintiff is entitled to receive damages.

In view of the foregoing this Court sees no reason to interfere with the decision of the Court below and the appeal is dismissed with costs.

Umtata. 28 November, 911. W. T. Brownlee, A.C.M.

Lize vs. Bushula Makalima.

(Tsolo.)

Estate Property—Diversion of Property From One House to Another—Marriages by Native Custom and Christian Rites—"Woman's Beast"—Isihewula—Circumcision Rites—Usutu huts—Illegitimate Boys—Fingo Customs—Native Marriage in Colony—Certificate of Citizenship—Nomination of Wives by Chiefs and Commoners.

This was an action by Bushula Makalima against his father Lize Makalima for a declaration that he is the son of Defendant in his Great House and for an order prohibiting Defendant from diverting property of the Great House to the Right Hand House. Defendant pleaded that Plaintiff was illegitimate and claimed in reconvention the delivery of certain cattle in Plaintiff's possession. (The claims are fully stated in the judgment.)

The Magistrate found that Plaintiff was Defendant's legitimate son, but gave absolution on the other claims in convention and on the claim in reconvention on the grounds that it was for Defendant to make an equitable distribution of property between his two houses.

In the Appeal Court the Native Assessors, Chiefs Dalindyebo and Sipendu and Headman Matanzima (Tsolo), Koyi (Umtata), Mandela (Umtata) were asked the following questions to which they replied:—

1. *Q.* Is "woman's beast" ever paid for a woman who is already married or who has already had children?

A. We know this custom in Fingoland and the beast is eaten by the women and is paid for the violent de-flowering of a virgin and is not paid for a woman who has had children.

[Note:—The term "woman's beast" is used to denote that the beast has been demanded by and paid to the women. In former days when a virgin had been forcibly de-flowered the women of her kraal might enter the cattle fold of the seducer and seize any animal there, generally the best, and this might be released only by the payment of a suitable animal known as Isihewula. This animal was then taken by the women and eaten by them.]

2. *Q.* Is a "white boys' lodge" (usutu) ever named after an illegitimate son?

A. The white boys' lodge is named after the chief boy who has been circumcised, the boy who is the head of the other boys. It has never happened that a lodge is named after an illegitimate boy.

Pres.:—In this case the Plaintiff claims an order declaring him to be the son of the Defendant in his Great House—the House of Defendant's First Wife Nolayi—whom Plaintiff alleges Defendant married in or about the year 1850: he also claims in virtue of the fact that there is no male heir in the Right Hand House of Defendant—the house of Nosanti, to be heir in that house also. He further claims the restoration to the Great House of certain property which he alleges the Defendant has diverted to the Right Hand House and he lastly claims an account of the rent of certain landed property situated in the Cape Province proper which he alleges is the property of the Great House and which he alleges the Defendant has used for the purposes of the Right Hand House.

The Defendant denies that the Plaintiff is his son, and says he never married the Plaintiff's mother, Nolayi, but cohabited with her as a concubine, and that Plaintiff is the offspring of such illicit intercourse. He says that Nosanti is his one and only wife, and that all his property belongs to her house, and in reconvention he claims certain twenty-eight head of cattle, which he says are his property and are in the possession of the Plaintiff. The Plaintiff admits that fourteen cattle and one horse, the property of Defendant, are at the kraal of which he is in charge, which, he says, is the Great kraal of Defendant.

It becomes necessary then to decide in the first place whether there was or was not a marriage between Defendant and the Plaintiff's mother, Nolayi.

It would appear that the parties all at one time lived at or near Alice, in the Cape Province; that they then moved to Maclear, and later moved to the Tsolo district, where they are now living, and that after living for a number of years in Tsolo the Defendant married Nosanti in church.

The Plaintiff alleges that Defendant married his mother, Nolayi, at Alice, and paid four head of cattle as dowry for her to her father, Marayi, and that he at a later date married Nosanti, also at Alice, and he states that his mother, being the first to be married, is Defendant's Great wife, both of them having been married under Native custom. He further states that his mother had

four daughters by Defendant, the dowries of all of whom have been paid to Defendant, and it is a portion of the dowries of these girls that he says has been removed and handed to the Right Hand House.

Defendant denies any marriage with Nolayi, and denies any payment of dowry for her, and he says that the woman Nolayi had already been twice married when he first became intimate with her, and had a child by each of her two husbands, and that at the time when he became intimate with her, her second husband, Ndunyana, was still alive. He says that being a Chief by birth, the idea of marriage with a woman of this kind—a dikazi, *i.e.*, a woman who had had children—would never have been entertained, but he admits that he paid one beast as a "woman's beast" when it was found that the woman Nolayi had become pregnant to him; that this beast was paid to the women of Marayi's kraal. who came to demand it, and being a woman's beast, it was killed and eaten by the women of Marayi's kraal. He further admits that when the woman Nolayi was delivered of twins, as the result of the intercourse between them, she was sent with them to him, and that she remained with him and had further children by him. He is, however, doubtful of the paternity of Plaintiff. He admits that he paid hut tax for her up to 1906, and that when the Plaintiff was circumcised the "white boys' lodge" was named after him, and that he has received the dowries of all Nolayi's daughters except that for Lisiwe, and he states his reason for not receiving this dowry is the fact that Lisiwe is not his daughter, but the daughter of another man.

The Native Assessors were asked their opinion as to the payment of a "woman's beast," and they say that they are acquainted with this custom in Fingoland, and that a "woman's beast" or "isihewula" is never paid except for the deflowering of a virgin, and is not paid for any woman who has already had a child. The President of this Court is also familiar with this custom, and his knowledge of it is the same as that of the Native Assessors. Furthermore, this beast is claimed by and paid to the women of the girl's father's kraal.

With regard to the naming of the "white boys' lodge," the Native Assessors state that it is the custom that this lodge should be named after the Chief boy who has been circumcised, and that it is never named after an illegitimate boy.

It seems then to this Court that the Magistrate in the Court below is right in holding that there was a marriage between Defendant and the woman Nolayi. It is absurd to say that the beast paid for Nolayi was a "woman's beast," seeing she had had children; and moreover the fact that Nolayi's alleged previous husband, Ndunyana, was still alive would preclude the payment of any cattle to Marayi's kraal, as supposing such a husband to exist he would be the only person competent to demand payment of a fine for intercourse with the woman, and such fine would not be paid as a "woman's beast," but as damages for adultery, and the only purpose for which cattle would, in the opinion of this Court, be paid to Marayi would, under all the circumstances disclosed, be for the purpose of dowry. It is not to be believed that any animal was paid to the women of Marayi's kraal, for the only beast paid to women is the "woman's beast" or "isihewula," and no "isihewula" could be demanded from Defendant for his intercourse with Nolayi, seeing that she was not a virgin when this intercourse began. The Court below has decided that the cattle paid by Defendant was paid as dowry, and this Court, in view of the foregoing, is entirely of the same opinion.

There are here then the essentials of a valid Native marriage; there is the payment of cattle to the woman's father, and there is the handing over of the woman to the man. If further proof were needed there are the admitted facts that Defendant had more children by Nolayi, who continued to live with him; that he paid hut tax for her, and when she finally followed him to Maclear, he apportioned her fields to plough; that he circumcised Plaintiff and named the "white boys' lodge" after him, and that he received the dowries for the three daughters of Nolayi; and here, as though to emphasise this incident, the Defendant says that he refused to receive the dowry paid for Lisiwe because she is not his daughter. The inference from this distinction is that he did regard the other girls as his daughters. With all this information before it, this Court is of opinion that it is not necessary to go into all the details of the evidence for and against the marriage, as these admitted facts are quite sufficient to justify the Magistrate in the Court below in finding that there was a marriage between Nolayi and the Defendant, and that as she was married before Nosanti she is the Great wife; and as to Defendant's assertion that he was

a Chief, it is only necessary to remark that at the time of the marriage he was neither a Chief nor a Headman, and had not even a kraal of his own, but lived at that of his brother Sikunyana. It is true that Chiefs follow a different practice from that of common men, and nominate their wives to their respective ranks; but this is because the Chief's Great wife is the mother of the people, and because the people of the tribe are required to contribute cattle for payment of her dowry.

The privilege cannot be conceded to Defendant.

It is argued for the Appellant that the fact of his having contracted a marriage in Church goes to show, because of the rule of the United Free Church, that the wife so married was either Defendant's Great wife or his only wife, but this Court can take no cognisance of what may have been done in this respect, for any enquiry by the Church Office-bearers into the matrimonial status of the Defendant was not that of a judicial Court, nor has the result of that enquiry any legal effect whatever.

It is further contended for Defendant that as the alleged marriage with Plaintiff's mother was contracted in the Cape Colony, and that as a Native marriage could not be regarded as a legal marriage there, and that as the marriage was not continued in the Native Territories, it cannot be regarded as a valid marriage in the Native Territories; that plaintiff is consequently not legitimate. The Defendant, however, who was in Court, admitted to the Court that at the time he left Alice to come to Maclear, in the Native Territories, he was the holder of a certificate of citizenship. This being the case, it is clear that had his estate to be administered in the Colony, it would have to be administered under the provisions of Native law and custom, this being provided for in the case of holders of certificates of citizenship by Act 18 of 1864; and as the Plaintiff had thus acquired certain rights of inheritance, he could not be deprived of them by the mere fact of removal into the Native Territories, where the same rights and customs prevail as those which he would have enjoyed under the provisions of Act 18 of 1864.

Even were this not, however, so, the decision in the case of *Jeke* vs. *Judge* (Supreme Court, 1894, 125), which is almost exactly the same as the case now before the Court, makes it quite clear, not only that the rights of Nolayi's house would not be extinguished by the removal into the Territories, but also that the

Defendant has not the right to divert property from the Great House to the Right Hand House, even should he later marry the wife of the Right Hand House in Church; and this Court is of opinion that the Magistrate in the Court below is right in declaring the Plaintiff to be the son and heir of the Defendant, at any rate in so far as the Great House—that is the house of Nolayi—is concerned. There is no appeal on the part of the Plaintiff, so that it is unnecessary for this Court to go into the question of the absolution judgment in the claim in convention.

With regard to the claim in reconvention, it is admitted by the Plaintiff—the Defendant in reconvention—that there is certain stock the property of the Defendant—Plaintiff in reconvention—at the kraal occupied by him, but he says this kraal is the kraal of the Defendant, and that the property in question appertains to that kraal.

It seems to be quite clear from the evidence that during the last few years an estrangement has arisen between Plaintiff and Defendant, and that in consequence of this estrangement the Defendant wishes to disown the Plaintiff, and to place all his property in the house of Nosanti, his Right Hand wife, whom he calls his only wife, and whom he married in Alice according to Native custom many years ago, and in Church at Tsolo a few years ago. What the cause of estrangement might be is not quite clear, but it seems to lie in the fact that Plaintiff has left the Church of his father and joined himself to another religious body, and this Court is of opinion that Defendant has had resort to the Church marriage with Nosanti merely to strengthen his position as against Plaintiff and to enable him to maintain the contention that Nosanti is his only wife, and it is clear that he wishes to establish Nosanti and her daughter Cubuka in the position of the heirs to all his property. The judgment in the case of *Jeke* vs. *Judge*, already referred to, makes it clear, however, that the heirs of this house can succeed only to that property which has been assigned to it. All property not assigned to it would under Native law devolve upon the Great House.

The Defendant admits that the property which he claims from the Plaintiff is stock belonging to his (Defendant's) father's estate, and stock accruing from the dowries paid for the daughters of Nolayi. The former devolves upon the Great House, and the latter naturally accrues to the house of Nolayi, and does not re-

quire to be assigned to it, and the Plaintiff may not divert it to the Right Hand House; and as the kraal at which the Plaintiff has the custody of this stock is the kraal of Defendant, this Court sees no reason to interfere with the absolution judgment in the claim in reconvention.

The appeal is dismissed with costs.

Umtata. 28 November, 1911. W. T. Brownlee, A.C.M.

Mapoloba vs. Mapoloba.

(Umtata.)

Widows—Disposal of Estate Property—Life Interest—Residence of Widows—Duties of Heir.

Velapi Mapoloba sued for a declaration of rights as to the estate of his late father, Sibidli. Plaintiff was the eldest son of Sibidli's Great House, and Defendant was the widow of the house. He alleged in his summons that he wished to remove with the property in the estate to the District of Port St. John's; that if Defendant wished to be supported out of the estate she was obliged to accompany him; that Defendant had wrongfully disposed of some of the property in the estate, partly for her own use and partly for payment of dowry for her son Silwanyana, a younger brother of Plaintiff. He therefore asked for a declaration of his right to remove the estate, an account from Defendant of all property in the estate, an order for her to accompany him if she wished to be maintained by the estate, and finally an order that he was entitled to the control of all the property.

Defendant admitted that Plaintiff was heir, subject to her own life interest in the estate. She said she lived at the Great Kraal of her late husband, and considered she was of right entitled to continue to live there and have the use of the property of her house, and she refused to live with Plaintiff in St. John's District. She denied having illegally disposed of any of the property. She said she sold one beast in order to obtain money to defend this case, and contended that the cattle handed over as dowry were the property of Silwanyana.

The Magistrate refused the application with costs, and gave the following reasons:—

"According to Native custom an heir to an estate of this kind cannot remove the position of the house without the consent of the widow, and he is bound to leave sufficient property with that House for the support of the widow and minor inmates. The widow, being a major, cannot be compelled to reside at any particular place, she can only be removed when she consents. She, of course, cannot alienate any of the property without the consent of the heir; she only has a life interest in it. The heir (Plaintiff) is now asking for an order compelling the widow to go with him to St. John's District; this is, however, entirely out of the question. He has not even got a roof to cover her at St. John's, even if she consented to remove; he admits that he has been refused permission to reside in that district by the Magistrate, so that in any case his application seems somewhat premature. Plaintiff's right of control which he prays for in his summons has never been taken from him, so that he is not entitled to an order on that point. As to the disposal of the property of the estate, the only beast which has been so disposed of without the consent of Plaintiff is the one beast which was sold to defend this action, and the Defendant was perfectly justified in this action. It is quite clear that she is being persecuted by her son, whose sole object is to obtain possession of the property, and this being the case, it is only fair that the estate should bear the cost of his action. The grounds upon which the application is based are contrary to existing custom and equity. The Plaintiff, who did not impress me favourably, did remove six cattle from this kraal to St. John's, and was very rightly ordered to restore them by the Magistrate of that district."

Plaintiff appealed.

Pres.:—In this case the Appellant, the Plaintiff in the Court below, asks for a definite ruling on the two following points. (*a*) as regards the rights of a son and his widowed mother; (*b*) as regards the rights of a widow to do away with the estate property of her late husband for her own ends, and for the ends of her younger children; and the first point having been put to the Native Assessors, they make the following statement:—

When a woman is married, and has become the mother of children, she is regarded as a princess in the house of her husband,

and must be respected and honoured. When she is left a widow she is entitled to support from the cattle of her husband as long as she remains at his kraal; and though the cattle are the inheritance of her son, yet he must not dispose of these cattle without reference to her, and he must wait for her death before he assumes the sole control of these cattle. The son may not compel her to leave her late husband's kraal and move to another. Should they, however, by mutual agreement arrange to move from the old site and establish a new kraal, the widow would exercise the same rights and privileges at the latter kraal which she enjoyed at the former. Should, however, the son himself move and establish a kraal of his own, leaving his mother in possession of her late husband's kraal, and should she thereafter leave her late husband's kraal and move to that of her son, she thereby loses her status, and though she is still entitled to support from her husband's cattle, she ceases to exercise her position of authority in the kraal. Should the son incur just liabilities he may look to the cattle of his father to settle these liabilities, but this must not be done without consulting with his mother."

The Plaintiff has then no right to compel his mother to move with him to St. John's, and as it seems to be quite clear that he now wishes to deprive his mother of the use of the cattle in question, he is not entitled to remove them from his late father's kraal so long as his mother, the Plaintiff, continues to reside there, and in any case they are not more than she is reasonably entitled to for her suitable maintenance.

With regard to the second point raised, it seems, in the opinion of this Court, that the Plaintiff has raised the point of the disposition of the two cattle to Jadezweni and the one to Ntozimbi for the purpose of making it appear that Defendant is unlawfully disposing of his father's estate. This Court, however, agrees with the view of the Court below that the Plaintiff was aware of the disposal of these cattle at the time that it was made, and that he was a consenting party thereto. There is definite evidence to this effect, and it is clear from the evidence that he in the first instance approved of payment of dowry to Siteto on behalf of his brother Silwanyana, and that after this dowry was returned he was at his father's kraal at the time when dowry was paid for Silwanyana to Jadezweni, and raised no objection; and that after a lapse of nearly two years, when he removed his father's cattle

to St. John's, he made no attempt to claim the two cattle disposed of to Jadezweni and the one beast disposed of to Ntozimbi, and in the opinion of this Court, while the Defendant would not be entitled to dispose of her late husband's cattle without the approval of the Plaintiff, yet the Plaintiff has failed to show that she has wrongfully disposed of any of the stock of his late father. She is not entitled to dispose of this stock without the consent and approval of the Plaintiff, her late husband's heir, but in the absence of any proof that she is making away with the stock, the Magistrate in the Court below is justified in refusing the order prayed for, and the appeal is dismissed with costs.

Kokstad. 4 December, 1911. A. H. Stanford, C.M.

Molisana vs. Leqela.

(Mount Fletcher.)

Abduction—Seduction—Fines—Tembu, Fingo and Basuto Customs.

Leqela sued Molisana and his guardian, as head of the kraal, for one horse and three head of cattle, as fines for the abduction and seduction of his daughter Ntuba, whom Defendant had taken into the Colony.

Defendant admitted abduction, but denied seduction, and pleaded that there was no fine under Native custom for abduction, for which he had already been punished criminally. He stated he wanted to marry the girl.

The Magistrate found that there was both abduction and seduction, and gave judgment for one horse and one beast, and Defendant appealed.

Chief Scanlen Lehana gave the following expert evidence in the Magistrate's Court:—"Since the War of the Guns the question of twalaing was introduced, and the girl's parents often demand a horse. Prior to that the question of twala, like teleka, was foreign to Basuto custom. What is done now is that the horse must be paid first if negotiations of marriage are to be entered into. Even if there is no intention that a marriage should take place, that horse (which is called pack-ox) has to be paid. That horse would not form part of any dowry subsequently paid. If

there is seduction as well as abduction another fine is imposed, for sometimes a girl may become pregnant. This horse is for the girl's father. A beast is given to the girl's mother."

Pres.:—The customs of the tribes vary on the question of liability in cases where a girl is carried off for the purpose of marriage. Under Tembu custom, if the girl is taken by the suitor to his parents' home, and is returned intact to her people, there is no liability for the abduction. If she has been seduced one beast is usually paid. Under Fingo custom a beast is always paid for the abduction, and there is also a further penalty if intercourse has taken place.

In this case the abduction is admitted, but instead of taking the girl, in accordance with custom, to his parents' kraal, Appellant eloped with her to the Cape Colony, being found and apprehended at Aliwal North with the girl Ntuba, after an absence of six weeks. Under these circumstances her statement that they cohabited must be believed.

The Native Assessors state that under Basuto custom a horse must be paid for abduction, but they disagree on the question of a further beast for seduction where marriage is offered, but in the present case are agreed that more than one beast should be paid.

The appeal is dismissed with costs. The Magistrate's judgment is amended by the addition of the words "the one paying, the other to be absolved."

Kokstad. 5 December, 1911. A. H. Stanford, C.M.

Ngxozana vs. Msutu.

(Mount Frere.)

Marriage—Wives Married by Christian Rites and Native Custom —Effect of Marriage by Colonial Law.

Ngxozana sued Msutu for the restoration of his wife or the dowry paid for her. The Magistrate gave an absolution judgment, and Plaintiff appealed.

Pres.:—Appellant was married by Native custom to two women. Some years ago he became a Christian, and notified to his second wife his intention of marrying the other wife by Christian rites; thereupon the second wife, Buku, left him.

In 1905 Appellant married his first wife by Christian rites, and by so doing annulled his marriage with Buku, the second wife, as by the Christian marriage he bound himself to keep to that wife only.

Having by his own act cancelled the marriage, the Appellant has no further claim to Buku or the dowry paid for her.

The appeal is dismissed with costs.

Kokstad. 5 December, 1911. A. H. Stanford, C.M.

Meleni vs. Mandlangisa.

(Mount Ayliff.)

Wives—Rights of—Diversion of Property—Maintenance—Discarding of Wives.

Mandlangisa sued her husband, Meleni, for (1) an account of the property of Defendant's Right Hand House, of which she was the wife; (2) an order that this property be placed in her care for the support of herself and her children, and that Defendant be debarred from removing such property.

She alleged in her summons that Defendant had assaulted her and driven her away from his Right Hand House.

Defendant in his plea stated that he had driven his wife away on account of her frequent misconduct, and admitted that he had forfeited the dowry paid for her. He said that Plaintiff must look to her father for support, as she has now no claim on him or for the property of the house to which she had belonged. In support of his plea he quoted the case of *Mbona* vs. *Sifuba* (N.A.C., p. 137).

Plaintiff quoted the case of *Noseki* vs. *Fubesi* (N.A.C., p. 36), and after taking evidence on the plea, the Magistrate gave the following ruling:—"The Court holds that such drastic driving away of a wife whose people (dowry holders) live at a distance such as Willowvale is neither Native custom nor equity. In this case the Plaintiff therefore had a right of action to secure the proper disposition of property belonging to her house: the plea is therefore disallowed with costs of the day, and the case ordered to proceed on its merits."

Pres.:—The Appellant, Meleni Gwiji, married the Respondent, Mandlangisa Meleni, about thirty years ago, in the Willowvale district, as his Right Hand wife, and paid eight cattle as dowry for her, and nine children have been born of the marriage, of whom only two survived, a son, a major, and an unmarried daughter. Appellant moved many years ago to East Griqualand, and finally settled in the Mount Ayliff district, where he established two kraals, one for the Great House and one for the Right Hand House, at which the Respondent has been living with her son, who is a married man, but at present away at Johannesburg. Appellant now has turned his wife, the Respondent, out of the kraal, and removed the property of her house to the Great House. He alleges that he has done so on account of her misconduct, but he has not proved any misconduct, and the evidence shows that he has frequently assaulted his wife, and his conduct in turning her out of her home into the veld 150 miles away from her own people, and in the absence of her son, cannot be too strongly condemned.

Under Native custom a man may discard his wife after enquiry in the presence of the assembled family and relations on good and reasonable cause being shown, and it is then incumbent on him to return her to her family with full explanation of the causes leading to such a step.

In the present case no reasonable cause whatever has been shown for such action. The husband's conduct has been both violent and unreasonable, his object being to destroy the Right Hand House and appropriate its property to the Great House. The Respondent has a clear right of action to protect the rights of herself and of her house.

The appeal is dismissed with costs.

Flagstaff. 11 December, 1911. A. H. Stanford, C.M.

Nompunde vs. Gqirana.

(Tabankulu.)

Marriage—Widows—Ownership of Children—Ukungena—Pondo Custom.

Gqirana sued Nompunde for three head of cattle as damages for adultery with his wife Magcuda, and an order declaring him the guardian of certain four children.

Defendant denied adultery, and stated that Magcuda was his brother's widow. He admitted that Plaintiff was father of the four children, but said Plaintiff never married the woman.

From the evidence it appeared Magcuda was the widow of Mqolo, Defendant's brother. She lived at Mqolo's kraal after his death for some time, and then went to her people's kraal, where she was married to Plaintiff. Subsequently she left Plaintiff and returned to Mqolo's kraal, where Defendant ngenaed her, and where she was still living.

The Magistrate gave judgment for Plaintiff as prayed.

Defendant appealed.

Pres.:—The case having been submitted to the Native Assessors, they state:—

"If a widow after the death of her husband returns to her own people, and is given in marriage, and subsequently returns to her first husband's kraal, and is ngenaed by a member of that family, such a person is not liable in damages for adultery to the second husband. If under such circumstances the woman has a child, such child would rank as a child of the deceased husband, and could not be claimed by the second husband. The second husband is entitled to the children the woman has borne to him."

The appeal is allowed with costs, the Magistrate's judgment amended, the damages awarded on the claim for adultery being deleted, the rest of the judgment to stand.

Flagstaff. 11 December, 1911. A. H. Stanford, C.M.

Maliwa vs. Maliwa.

(Lusikisiki.)

Inheritance—Revival of Houses—Seed-bearers—Nomination of Heirs—Pondo Custom.

Joel Maliwa sued Samuel Maliwa for certain property in the estate of the late Charlie Maliwa. He alleged in his summons that he and Defendant were sons of the late Charlie Maliwa; that Charlie had three wives, viz.: (1) Mampambani, (2) Mabala, and (3) Mamanci; that Defendant was son of Mabala, and Plaintiff son of Mamanci; that Mapambani became an invalid after having two children, one a boy named Simenukane; that a family meeting was called by the late Charlie and his father, and it was

arranged that the third wife, Mamanci, should be placed in the hut of the first wife, Mampambani, who died shortly after; that Simenukane died without male issue, and Plaintiff was declared the heir, and that accordingly Plaintiff inherited the property of the first hut.

Defendant contended that as son of the kohlo hut he inherited the property.

The evidence led by Plaintiff showed that after the birth of Simenukane the Great wife became an invalid, and it was decided that another wife should be married to bring up the children; but before Charlie married the girl selected (Mamanci) he married Mabala, because he said he had already made her pregnant. He then married Mamanci "as Mampambani's bladder," and shortly after this marriage Mampambani died. After Simenukane's death it was stated two meetings were called, and Plaintiff nominated as the heir of the Great House.

The defence was that Mamanci was never put in the Great House, but that Mampambani committed adultery and ran away, and thereafter the kohlo wife was put into the Great hut and made the Great wife; that Charlie married Mamanci for his grandmother—Mahanjana's wife—and that she never lived in the Great hut.

The Magistrate declared Plaintiff Joel to be the heir, and gave the following reasons: —

"Plaintiff is suing to be declared heir of his late father, Charlie Maliwa's, estate, that is, of the Great House.

"Charlie had three wives, first Mampambani, second Mabala, and third Mamanci.

"It is common cause that Mampambani's son, Simenukane, died without male issue, and the point to be decided is whether, as stated by Plaintiff, his mother (Mamanci) was married as 'Mampambani's bladder,' or if the kohlo hut (Defendant's mother) was made Great wife. Plaintiff is supported by all the living members of this family as to his mother being married as 'Mampambani's bladder' (child bearer), when the latter became an invalid; in such a case Mamanci's children would be regarded as Simenukane's younger brothers and sisters, and upon Simenukane's death old Maliwa announced to the Headman Amos, John Ngaka and others who his heir was. The Court regarded this merely as an announcement, and not as a nomina-

tion, because the evidence goes to show that Mamanci's marriage was decided upon after and in consequence of the breakdown in health of Mampambani, and the fact that these two women were cousins is a reason for the younger woman (Plaintiff's mother) being put into the invalid's hut. According to Pondo custom Mampambani's father should have furnished the bladder from his own daughters, but Charlie could not expect a brother of his father-in-law to do so unless he paid dowry.

"John Ngaka says all the members of the family attended the announcement, and no dissentient voice was raised, and Amos says that since he was told of it he has always dealt with Plaintiff as the head of the kraal.

"The defence is that in consequence of Mampambani leaving her husband, on account of her having committed adultery, Mabala was made Chief wife, although she had been married as kohlo hut. This is not in accordance with custom, because the kohlo would only become Great Hut when the latter died out; but from Samuel's answers to the Court it would appear that his mother was made Great wife when Mampambani ran away, and while Simenukane was still alive; and Mabala bears this out in saying: 'I lived in the same hut as Charlie's Great wife had occupied.' Mabala also contradicts her own son's evidence regarding the announcement that Plaintiff was Simenukane's successor, and as such, head of the family. She also contradicts the other members of the family that Mamanci was appointed 'Mampambani's bladder'; this contradiction is significant, as showing that had such been the case Plaintiff's contention would have been right.

"The Court found that Mamanci was appointed 'Mampambani's bladder,' and that Plaintiff would *ipso facto* succeed Simenukane; that Maliwa made a public announcement as to who his heir was, since when Plaintiff has always been regarded as head of the family, and on these facts found for Plaintiff."

Defendant appealed.

In the Appeal Court, the case having been submitted to the Native Assessors on the question of Native custom, they stated:— "It is not competent for a husband, during the lifetime of his wife, and she having a son living at the time, to put another woman into the house to replace such wife or bear children for her. The fact that such a wife is a cripple or invalid makes no difference.

"On the death of a wife without male issue, or even with male issue, the husband may marry a girl and put her into the deceased wife's house to replace her; she must be given all the utensils and belongings of the late woman; then failing male issue by the deceased wife, the son of the woman who replaced her would inherit. It is not competent for a husband to take a wife he has already married and place her in another house, nor can a common man nominate his heir.

"If a wife leaves her husband, and refuses to return to him, and the marriage is dissolved, he may marry another wife, and put her in that house to replace the wife who has left.

"In a case where a wife has no male issue he may also marry a girl and place her in that house as seed-bearer to the other wife, and failing male issue by the first wife, the son of the seed-bearer would inherit the property of that house.

"If a man dissolves his marriage by driving his wife away, it is competent for him to keep that house alive by marrying another woman and placing her in that house, but the first wife's son, if she has one, would inherit."

Pres.:—In the present action the evidence shows that on her marriage Mamanci was placed, not in the hut of Charlie's Great wife, but at the kraal of his grandfather, Mahanjana. This casts a doubt on the assertion that she was married to replace the Great wife, which doubt is increased by the twice repeated action of Maliwa, after the death of Simenukane, in announcing that Joel was his heir. If Joel's mother had been formally substituted for Mampambani such action was wholly unnecessary, as by that alone he would have succeeded.

In view of the facts, and also that the marriage between Charlie and Mampambani was never dissolved, the appeal must be allowed with costs, and the Magistrate's judgment altered to judgment for the Defendant with costs.